LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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OFFICIAL HEARING RECORD

MATERIAL SUBMITTED FOR THE HEARING RECORD BUT NOT REPRINTED

Publication entitled "Hyperlink to Hinduphobia: Online Hatred, Extremism and Bigotry Against Hindus," Hindu American Foundation. This submission is available at the Subcommittee and can also be accessed at:

http://www.hinduamericanfoundation.org/pdf/hate__report__2007.pdf

LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT OF 2007

TUESDAY, APRIL 17, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:08 p.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler presiding.

Present: Representatives Nadler, Conyers, Waters, Johnson, Jackson Lee, Baldwin, Gohmert, Coble, Chabot, and Lungren.

Mr. NADLER. Good afternoon. I am Congressman Jerrold Nadler. I thank you all for attending today's hearing.

Unfortunately, the Chairman of the Subcommittee, Bobby Scott, is in Virginia at a memorial service for the victims of yesterday's tragedy at Virginia Tech. My thoughts, of course, are with the victims' families and loved ones.

At this point, I ask that we take a moment of silence in the memory of these victims.

I know that addressing the issue of hate crimes is a big priority for Chairman Scott, as it is for me, and in that spirit, we will begin this important hearing.

Today's hearing deals with one of the most destructive crimes in our society, crimes committed against victims who have been singled out solely because someone does not like who they are. Whether it is because of the actual or perceived race, color, religion, national origin, sexual orientation, gender, gender identity or disability of the victim, these violent acts often can cause death or bodily injury and are absolutely reprehensible.

They target not just an individual but an entire group. These crimes do and are often intended to spread terror among all members of the group, and they are intended not merely to do so, but often to deter members of the group from exercising their constitutional rights, sometimes from simply walking down the wrong street or, indeed, any street.

As with most criminal activity, bias crimes are properly investigated and prosecuted at both the Federal and State or local levels, depending on the facts of the case and the needs of the investigation.

The FBI has the best national data on reported hate crimes, although the reporting program is voluntary. Since 1991, the FBI has documented over 113,000 hate crimes. For the year 2005, the most

current data available, the FBI compiled reports from law enforcement agencies identify 7,163 bias-motivated criminal incidents that have been reported to them. Law enforcement agencies identified 8,795 victims arising from 8,373 separate criminal offenses.

As in the past, racially motivated bias accounted for more than half, 54.7 percent, of all incidents. Religious bias accounted for 1,227 incidents, 17 percent, and sexual orientation bias for 1,017 incidents, 14 percent, followed by ethnicity/national origin bias with 944 incidents, 14 percent.

While these numbers are disturbing, it is important to note that for a variety of reasons, hate crimes are seriously under-reported. These reported numbers are a serious understatement of the problem.

The proposed legislation that we are going to be considering would provide real penalties and address the problem as it actually exists. It would deal not just with crimes designed to deprive someone of a narrow list of federally protected rights, but with all hate crimes committed where there is Federal jurisdiction. It also provides assistance for law enforcement back home to help them cope with this problem.

Let us be clear: This is not an issue of free speech. What is covered here are criminal acts in which the victim is actually harmed and is selected because of his or her status. The law routinely looks to the motivation of a crime and treats the more heinous of them differently. Manslaughter is different from premeditated murder, which is different from a contract killing, though the result is the same in all cases.

We all know how to make these distinctions and the law does it all the time. The only question for Members is whether they believe that singling out a person for a crime of violence because of his or her race or religion or because of any other trait mentioned in this bill is sufficiently heinous to require strong action by law enforcement. Do we want to give law enforcement the tools to deal with this very real problem? I, for one, hope the answer is yes.

For many years, Congress debated what were known as the Federal lynch laws. These were designed to deal with the widespread practice of lynching primarily African-Americans. There was staunch resistance of these laws here in Congress, and their enactment was delayed for decades. It was not a proud moment or, I must say, a series of moments lasting for decades in our Nation's history. We now have the opportunity to do the right thing. I hope we can agree to do so.

I thank you.

I now yield to the distinguished Ranking Member, Mr. Gohmert, for opening comments.

Mr. GOHMERT. Thank you, Mr. Chairman.

We all do extend our prayers and sympathy to the families of those who have been hurt or killed at Virginia Tech and, in fact, to the entire Virginia Tech family itself.

Some might think why should we be taking this matter up on a day after such a tragedy when today the Crime Subcommittee here will have this hearing on the new hate crime bill. We know that people who act out of hate can and do cause terrible devastation

and hurt. There is no question about that. Those who cause such harm deserve and should be punished.

A couple of the most often cited cases as a basis for creating new hate crimes laws usually include the case, tragically, where the African-American in Texas was dragged to death and another horrible case in Texas where a young man was killed for being a homosexual. In both of those cases, the main perpetrators got the death penalty they deserved.

These and other cases are often cited as reasons for hate crime laws. These are cases in which hate crime laws actually would have made no difference at all.

In the dragging death case, I would personally support punishment where the victim's family in that case could choose the rope or the chain used to drag and then the terrain they want to drag the defendant over to bring about the death penalty. But that is not what this does. In fact, the death penalty is not even an issue here. So it would have had absolutely no effect on some of the cases that are heralded as poster examples.

The new hate crime bill creates a vague, ambiguous Federal offense that sends a message that random, senseless acts of violence, possibly like yesterday at Virginia Tech, are far more preferable in society than the same violent actions with a motive.

Never mind that sociopaths and antisocial personalities who commit random, senseless acts of violence are normally more than likely difficult to be rehabilited. They will not get punished under this new law. Gang members who commit some of the most senseless and tragic acts of violence, sometimes simply as an initiation ritual, will be punished not under this bill.

This hate crimes bill says to the world that sexual orientation—and not just gender, but gender identity, whatever that vague definition means—are in the same category as those persons who have suffered for the color of their skin or their religion. It says to the world that in the priorities of the majority of the United States Congress, a transvestite with gender identity issues will now be more important to protect than a heterosexual, than college or school students, or even senior citizens and widows with no gender identity issues.

Whatever happened to the idea that we were all created equal and that we were all matter equally in God's eyes? We all deserve equal protection.

Think about the plain meaning of the word "sexual orientation." Regardless of the definitions society puts on those words today, the courts will one day say sexual orientation means exactly what they say, that sexual orientation one of these days will be taken to mean those very words that includes you are sexually oriented toward children, sexually oriented toward corpses, sexually oriented toward animals. Someday, these words can be easily cited by an appellate court as having the very plain meaning, not just the meaning that socially and culturally is accepted right now.

One other aspect that is not usually discussed will come in the new law would be applied along with Article 18 U.S. Code Section 2(a) of the Federal criminal code that says, "Whoever aids, abets, counsels, commands, induces or procures a crime commission is punishable just as if he is the principal."

You should understand what that means. If a Christian, Jewish or Muslim religious leader teaches or preaches that homosexuality is wrong or is a sin or someone in the leader's flock commits a crime against a person who practices such act, that religious leader may have counseled or induced under the argument and someday someone will say so and ministers will be arrested for their preaching. They will be said to have incited such conduct through their teaching from the Bible, the Torah or Koran.

As a matter of fact, some people already blame religious ministers for acts of violence, even though none of them defend anyone who supports those acts of violence. They are wrong, and they are already punishable under existing laws.

As a judge, I have harshly sentenced people who have committed crimes of hate and also those who have committed crimes as random, cold-blooded, heartless thugs, and I can tell you the victims and their loved ones in each case are all traumatized and distraught and deserving of sympathy and compassion.

Proponents of this legislation say hate crimes are more deserving of special punishment because they send, "fear or in discomfiture" across an entire community, but if you look at the fear and discomfiture that is created by crimes like we saw yesterday, you understand everyone deserves equal protection. It was not apparently a hate crime unless it is true that he killed people because they were rich. It still sent fear and discomfiture to every college campus.

This hate crime legislation, though, tells the country that victims like those young people yesterday, if they are killed randomly, they are not nearly as important to the country as transvestites with gender issues.

So the message of the hate crime legislation today is apparently this: If you are going to shoot, brutalize or hurt someone, the majority in Congress begs you not to hate us while you are shooting or brutalizing us. Please make it a random, senseless act of violence," and that does not make sense.

Thank you.

Mr. NADLER. Thank you.

I will now recognize for 5 minutes the distinguished Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. Well, thank you for giving me enough time to get my breath after that presentation, Mr. Chairman.

As the author of this subject matter, hate crimes, for the last decade, I have never started a hearing with that much opposition to this legislation. But then that is what we are here for, to see if we can talk and reason our way across this understanding that we are not giving anybody superior protection; we are bringing in a group that have been excluded for a long time.

You yourself referred to lynchings, which were tragically one time commonplace in this country. Nearly 4,000 African-Americans were killed, lynched, tortured between 1880 and 1930, and during the same period, thereafter, religious groups of Jewish faith, Mormons also, and others were subject to attack. Arab-Americans are now coming into that category as well.

As we all understand, hate violence against minority groups of all kinds in this Nation has a long and ignominious history that continues even today. We have seen and we heard the statistics

that Chairman Nadler has referenced, and so to protect against this hate violence, to protect the Nation against hate violence, I have introduced the Hate Crimes Prevention Act for the last decade with ever-increasing support.

The measure before us today has more than 130 cosponsors and will provide assistance to State and local enforcement agencies to amend Federal law to facilitate the investigation and prosecution of violent, bias-motivated crimes. It does not take the original jurisdiction away from the States. This complements some very important support that frequently is needed in some areas for these crimes to be prosecuted.

I am proud that over 230 educational, religious organizations, civic groups, civil rights organizations, virtually every major law enforcement organization in the country has endorsed the proposal that is before us. It is a proposal that is very little different from the one I introduced in the last Congress that passed the House of Representatives.

So, despite the deep impact of hate violence on communities, current law limits Federal jurisdiction over hate crimes to incidents only if the victim is engaged in federally protected activities, and that we propose to modify.

And so, like the Church Arson Prevention Act of 1996 which helped Federal prosecutors combat church arson by addressing unduly rigid jurisdictional requirements under Federal law, State and local authorities currently prosecute the overwhelming majority of hate crimes and will continue to do so under this legislation. The Federal Government will continue to defer to State and local authorities in the vast majority of cases. The Attorney General or high-ranking Justice Department official must approve any prosecutions taken in this sense.

So we come together to reaffirm in even greater numbers and with greater understanding the need for hate crime legislation, and I have every confidence that it will pass in the House of Representatives, and we are hoping to get it through this time in the other body.

Thank you for this opportunity, Mr. Chairman.

Mr. NADLER. Thank you.

In the interest of proceeding to our witnesses and mindful of our busy schedules, I would guess that other Members submit their statements for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing if any reason arises.

As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority Members, provided that the Member is present when his or her term arises. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or who is only able to be with us for a short time.

I would now like to welcome our distinguished panel of witnesses.

Our first witness, the Honorable Mark Shurtleff, is currently in his second term as the attorney general for the State of Utah. In addition to his current office, Mr. Shurtleff serves as chairman for the internal relations and civil rights committee of the National Association of Attorneys General. He has previously served in the United States Navy, Judge Advocate General's Corps, as an officer and attorney. Mr. Shurtleff received his bachelor's degree from Brigham Young University and his law degree from the University of Utah School of Law.

Our next witness, Mr. Timothy Lynch, is the associate director of the project on criminal justice for the Cato Institute. Prior to his current position, Mr. Lynch served on the National Committee to Prevent Wrongful Executions. He has also filed several amicus briefs in the United States Supreme Court in cases involving constitutional rights. Mr. Lynch holds a bachelor's and law degree from Marquette University.

Next is that Dean Frederick Lawrence, dean and professor of law at the George Washington University Law School. Dean Lawrence began his legal career as a clerk to Judge Amalya L. Kearse in the U.S. Court of Appeals for the Second Circuit. He was later named an assistant U.S. attorney to the Southern District of New York where he became chief of the civil rights unit. Dean Lawrence has a bachelor's degree from Williams College and a law degree from Yale University.

Our next witness is Mr. David Ritcheson who survived a horrendous act of hate violence nearly 1 year ago on April 22, 2006, in Harris County, TX. Two individuals attacked him because he is a Mexican-American. He has agreed to speak about this terrible experience and to explain why legislation like the Local Law Enforcement Hate Crimes Prevention Act of 2007 is so very important.

Our next witness, Mr. Brad Dacus—I hope I am pronouncing that right—served as legislative assistant to U.S. Senator Phil Gramm and went on to receive his law degree from the University of Texas Law School. For the next 5 years, Mr. Dacus coordinated religious freedom and parental rights cases throughout the western States. In 1977, Mr. Dacus was the founder and president of the Pacific Justice Institute whose mission is to defend religious liberty and parental rights.

Our final witness is Dean Jack McDevitt, associate dean for research and graduate students and the director of the Institute on race and justice in the College of Criminal Justice at Northeastern University. In addition to his current post, Dean McDevitt has testified as an extra witness before the U.S. Senate Judiciary Committee and the U.S. Civil Rights Commission. He has also served as a consultant to the FBI and the Bureau of Justice Statistics.

On behalf of the Subcommittee, I want to extend a warm welcome to all of you.

And I want to recognize, for the purpose of extending a welcome to a constituent, the distinguished gentlelady from Texas, Ms. Sheila Jackson Lee.

Ms. JACKSON LEE. Let me thank the Chairman of the Committee and let me thank you very quickly, recognizing the kindness that you have extended.

Let me also acknowledge the Chairman of the full Committee and the Chairman of the Subcommittee for this very important hearing.

My statement and my welcome is to welcome David for his courage. As a freshman at Klein Collins High School, he had to experience a horrific experience that no child—and he is a young man—should ever have to have as part of his memory.

David, we thank you and your family, Mr. and Mrs. Galvan, and your wonderful counselor for allowing me to sit with you and to hear your story so many, many, many months ago.

Might I say that I enthusiastically support the underlying bill, and I am delighted to have the opportunity to raise your bill, David Ray's Law, that speaks to the issue of young people and the horrificness of young people being engaged in hate crimes and being solicited by adults, and I hope that the David Ray's Law can be a part of the underlying bill to make this a complete response to the tragedy and the disaster and the devastation of hate crimes.

Welcome, David. We are all so very proud of you.

And I yield back.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

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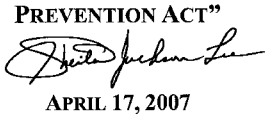
CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

STATEMENT BEFORE THE

JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

LEGISLATIVE HEARING: H.R. 1592 "LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT"



APRIL 17, 2007

Thank you, Mr. Chairman for holding this hearing. It is more timely than any of could have predicted just 24 hours ago. Just yesterday, at Virginia Tech University, one of the nation's great land grant colleges, we witnessed the most senseless acts of violence on a scale unprecedented in our history. Neither the mind nor the heart

can contemplate a cause that could lead a human being to inflict such injury and destruction on fellow human beings. The loss of life and innocence at Virginia Tech is a tragedy over which all Americans mourn and the thoughts and prayers of people of goodwill everywhere go out to the victims and their families. In the face of such overwhelming grief, I hope they can take comfort in the certain knowledge that unearned suffering is redemptive.

But the carnage at Virginia Tech also commands that we here in this body take a stand against senseless acts of violence taken against persons for no reason other than that they are different, whether in terms of race, religion, national origin, gender, or sexual orientation. It is long past time for our national community to declare that injuries inflicted on any member of the community by another simply because he or she is different poses a threat to the peace and security of the entire community. For that reason alone, such conduct must be outlawed and punished severely.

That is why I have, Mr. Chairman, since 1999 introduced strong legislation to deter and punish hate crimes. In addition to being an original co-sponsor of H.R. 1592, the Local Law Enforcement Hate Crimes Prevention Act of 2007, I have also introduced H.R. 254, the

"David Ray Hate Crimes Act of 2007." My bill, "David's Law," calls for increasing Federal enforcement and involvement of hate crimes. My legislation punishes behavior with a maximum penalty of ten years, without limiting or punishing speech. It also calls for the United States Sentencing Commission to study the issue of adult recruitment of juveniles to commit hate crimes and, if appropriate, amend the Federal sentencing guidelines to provide sentencing enhancements for adult defenders who recruit juveniles to assist in the commission of hate crimes. Finally, my hate crimes legislation authorizes the creation of grants to State and local programs designed to combat hate crimes committed by juveniles.

I am very pleased to inform you, Mr. Chairman, that my legislation is named for one of the witnesses before us today, Mr. David Ray Ritcheson, who has courageously come forward to tell his story in the hopes of saving others from experiencing a similar brutal ordeal. Thank you, Mr. Ritcheson, for what you are doing to make our country better.

Mr. Chairman, every act of violence is tragic and harmful in its consequences, but not all crime is based on hate. A hate crime or bias motivated crime occurs when the perpetrator of the crime

intentionally selects the victim because of who the victim is. A bias motivated crime affects not only the victim and their family but an entire community or category of people and their families. A study funded by the Bureau of Justice Statistics released September 2000, shows that 85 percent of law enforcement officials surveyed recognize bias motivated violence to be more serious than similar crimes not motivated by bias.

Hate crimes are destructive and divisive. A random act of violence resulting in injury or even death is a tragic event that devastates the lives of the victim and their family, but the intentional selection and beating or murder of an individual because of who they are terrorizes an entire community and sometimes the nation. For example, it is easy to recognize the difference between check-kiting and a cross burning; or an arson of an office building versus the intentional torching of a church or synagogue. The church or synagogue burning has a profound impact on the congregation, the faith community, the greater community, and the nation.

Mr. Chairman, some opponents of hate crimes legislation claim that such legislation is a solution in search of a problem. They claim that there is no epidemic of bias motivated violence and thus no need

to legislate. I wish to briefly address this claim.

Every individual's life is valuable and sacred, and even one life lost is too many. There is ample evidence that violent, bias motivated crimes are a widespread and serious problem in our nation. But it is not the frequency or number of these crimes alone, that distinguish these acts of violence from other types of crime; it is the impact these crimes have on the victims, their families, their communities and, in some instances, the nation.

Evidence indicates that bias motivated crimes are underreported; however, statistics show that since 1991 over 100,000 hate crime offenses have been reported to the FBI, with 7,163 reported in 2005, the FBI's most recent reporting period. Crimes based on race-related bias were by far the most common, representing 54.7 percent of all offenses for 2005. Crimes based on religion represented 17.1 percent and ethnicity/national origin, 13.2 percent. Crimes based on sexual orientation constituted 14.2 percent of all bias motivated crimes in 2005, with 1,017 reported for the year. The National Coalition of Anti-Violence Programs (NCAVP), a non-profit organization that tracks bias incidents against gay, lesbian, bisexual and transgender people, reported 1,985 incidents for 2005

from only 13 jurisdictions, compared to the 12,417 agencies reporting to the FBI in 2005.

Additionally, the Hate Crimes Statistics Act makes the reporting of bias motivated crimes by state and local jurisdictions voluntary, resulting in no participation by many jurisdictions each year. Hawaii, for instance, did not participate in reporting at all in 2005. Underreporting is also common. Wyoming, for instance, reported only 4 incidents for 2005. Six states reported 10 or fewer incidents in 2005. Some large cities have been egregiously deficient in reporting hate crimes. Jacksonville, Florida, for example, reported only 5 incidents in 2005.

Sadly, statistics only give a glimpse of the problem. It is widely recognized that violent crimes on the basis of sexual orientation often go unreported due to fear and stigmatization. A Department of Justice report released in October 2001 confirms that bias motivated crimes are under-reported; that a disproportionately high percentage of both victims and perpetrators of these violent crimes are young people under 25 years of age; and that only 20 percent of reported hate crimes result in arrest.

A December 2001 report by the Southern Poverty Law Center

(SPLC), a nonprofit organization that monitors hate groups and extremist activity in the United States, went so far as to say that the system for collecting hate crimes data in this nation is "in shambles." SPLC estimates that the real number of hate crimes being committed in the United States each year is likely closer to 50,000, as opposed to the nearly 8,000 reported by the FBI.

Next, Mr. Chairman, let me address the specious claim that the bill before us, or my own legislation, abridges free speech. Opponents seem to be complaining that the legislation would prohibit pursuant to Rule 404 of the Federal Rules of Evidence, the introduction of substantive evidence of the defendant's expression or associations, *unless the evidence specifically relates to the offense or is used to impeach a witness*. In this way, the legislation strikes the appropriate balance between two competing interests: the interest of the government in punishing hate crimes and the rights of the defendant.

Our hate crimes legislation allows the government to punish hate crimes more severely because of the distinct emotional harm they cause their victims, the community unrest they incite, and the likelihood that they will provoke retaliatory crimes. *See Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993) (upholding a hate crimes

punishment enhancement statute). However, the bill also protects a defendant's rights by only permitting the introduction of evidence within the confines of the Federal Rules of Evidence and the First Amendment.

The First Amendment protects speech and expressive conduct. Our bill only punishes criminal conduct, which is not protected by the First Amendment. Any argument that this legislation punishes expressive conduct would likely be unsuccessful because using violence to convey one's ideas is outside the scope of the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). In *Wisconsin v. Mitchell* the Court distinguished between statutes that are explicitly directed at expression and statutes that are directed at conduct. 508 U.S. at 487. The Court upheld the statute in *Wisconsin v. Mitchell* because it was directed at criminal conduct, unlike the statute at issue in *R.A.V. v. St. Paul*, which the Court struck down because it was explicitly directed at expression. *Id.* The critical flaw with the statute at issue in *R.A.V.* was that it was viewpoint discriminatory: it prohibited otherwise permissible speech based on the subject and perspective of the speech. *R.A.V. v. St. Paul*, 505 U.S. 377,391 (1992).

The legislation before us does not punish expressive conduct, such as cross burning or flag burning. Rather, the Act is only directed at criminal conduct that is independently criminal, such as assault or murder. It punishes already criminal conduct more severely because of the defendant's motivation in choosing her victim. Thus, evidence of a defendant's expressions and associations can be admitted under certain circumstances.

In conclusion, let me thank the Chairman again for convening this very important hearing. I am confident that working together, we can reduce the incidents of hate crimes in America. Finally, let me extend my warmest welcome to our witnesses:

1. Honorable Mark L. Shurtleff, Attorney General of the State of Utah
2. Timothy Lynch, Director, Project on Criminal Justice, Cato Institute
3. Frederick M. Lawrence, Dean, The George Washington University Law School
4. David Ray Ritcheson, Harris County, Texas
5. Brad W. Dacus, President, Pacific Justice Institute
6. Jack McDevitt, Associate Dean, Northeastern University

I look forward to hearing from this distinguished panel of witnesses. I yield back my time.

Mr. NADLER. I thank the gentlelady.

Without objection, the written statements from the witnesses will be made part of the record in their entirety.

I would ask each witness to summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at your table, which you will see. When 1 minute remains, the light will switch from green to yellow, and then to red when the 5 minutes are up.

I will recognize—I suppose, left to right—Mr. Shurtleff first.

Push the button.

TESTIMONY OF THE HONORABLE MARK L. SHURTLEFF, ATTORNEY GENERAL OF THE STATE OF UTAH

Mr. SHURTLEFF. My name is Mark Shurtleff, Utah attorney general. Mr. Chairman, Members of the Committee, I appreciate the opportunity to be here today and speak in support of H.R. 1592.

For the second year in a row now, the attorney general of Illinois, Lisa Madigan, and I have co-authored a letter signed by both sides of the aisle, if you will, of attorneys general. We have submitted a letter dated April 16, signed by 26 attorneys general, and, in fact, we just had another letter passed out of the same date, signed by your former colleague and now my colleague, Attorney General Bill McCollum of Florida, in support of hate crimes legislation.

[The information referred to follows:]

STATE ATTORNEYS GENERAL
A Communication From the Chief Legal Officers
Of the Following States:

Arizona - Arkansas - Connecticut - District of Columbia - Georgia - Hawaii - Illinois - Iowa
Kentucky - Louisiana - Maine - Maryland - Massachusetts - Minnesota - Missouri - Montana
Nevada - New Mexico - New York - Ohio - Oregon - Rhode Island - Utah - Vermont
Virgin Islands - Washington

April 16, 2007

Via Facsimile

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
H-232, The Capitol
Washington, D.C. 20515

The Honorable John Boehner
Minority Leader
U.S. House of Representatives
H-204, The Capitol
Washington, D.C. 20515

The Honorable Harry Reid
Majority Leader
United States Senate
S-221, The Capitol
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
S-230, The Capitol
Washington, D.C. 20510

We, the undersigned Attorneys General, are writing to express our strong support of Congressional efforts towards the immediate passage of federal hate crimes legislation. As the chief legal officers in our respective jurisdictions, State Attorneys General are on the front lines in the fight to protect our citizens' civil rights. Although state and local governments continue to have the primary responsibility for enforcing criminal law, we believe that federal assistance is critical in fighting the invidious effects of hate crimes.

This much needed legislation would remove unnecessary jurisdictional barriers to permit the U.S. Department of Justice to prosecute violent acts motivated by bias and hate and complement existing federal law by providing new authority for crimes where the victim is intentionally selected because of his or her gender, gender identity, sexual orientation, or disability. Under current law, the Justice Department can only prosecute crimes motivated by the victim's race, religion, or national origin when that person is engaged in a federally protected activity, such as voting. Legislative proposals, such as the Local Law Enforcement Hate Crime Prevention Act of 2007 (LLEHCPA) and others, however, would permit federal prosecution of hate crimes irrespective of whether they were committed while the victim was engaged in protected activity.

Removing this outmoded jurisdictional barrier to federal prosecution of hate crimes is critical to protecting our citizens' fundamental civil rights. In 2005, the most recent

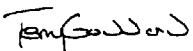
figures available, the FBI documented 7,163 crimes reported from 12,417 law enforcement agencies across the country. Yet, it is not the frequency or number of hate crimes, alone, that distinguish these acts of violence from other crimes. Rather, our experiences as prosecutors have shown us, that these crimes can have a special impact on victims, their families, their communities and, in some instances, the nation. Indeed, in *Wisconsin v. Mitchell*, 508 U.S. 47 (1993), Chief Justice William Rehnquist wrote for a unanimous Supreme Court in upholding the constitutionality of enhanced penalties for crimes motivated by bias or hate against a person because of race, religion, color, disability, sexual orientation, national origin or ancestry. In so ruling, the Court recognized that "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." Hate crimes have lead to the polarization of communities, increases in security needs at schools and churches, declines in property values and the creation of an overall atmosphere of fear and distrust. All too often that climate has hindered the efforts of local law enforcement and placed the lives of police officers and civilians in jeopardy.

As the chief legal and law enforcement officers of our respective states, we are mindful that the overwhelming majority of criminal cases should be brought by local police and prosecutors at the state level. However, in those rare situations in which local authorities are unable to act, measures such as the LLEHCPA and others provide a backstop to state and local law enforcement by allowing federal involvement if it is necessary to provide a just result. These measures would provide invaluable tools to federal law enforcement to help state authorities in their fight against hate crimes. Therefore, we strongly urge the passage of important hate crimes legislation by the 110th Congress.

Sincerely,

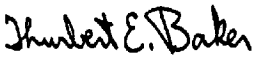
Lisa Madigan
Attorney General of Illinois

Mark Shurtleff
Attorney General of Utah

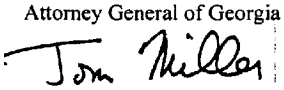


Terry Goddard
Attorney General of Arizona

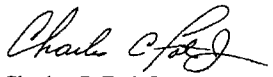
Richard Blumenthal
Attorney General of Connecticut



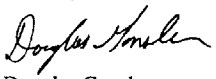
Thurbert E. Baker
Attorney General of Georgia



Tom Miller
Attorney General of Iowa

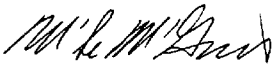


Charles C. Foti, Jr.
Attorney General of Louisiana

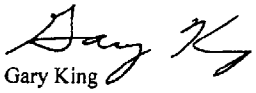


Douglas Gansler
Attorney General of Maryland

Lori Swanson
Attorney General of Minnesota

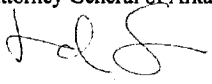


Mike McGrath
Attorney General of Montana



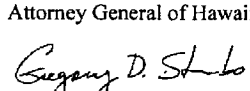
Gary King
Attorney General of New Mexico

Dustin McDaniel
Attorney General of Arkansas

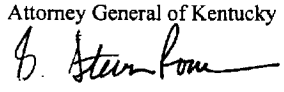


Linda Singer
Attorney General of District of Columbia

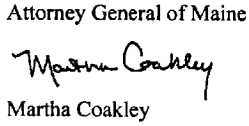
Mark J. Bennett
Attorney General of Hawaii



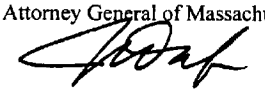
Gregory D. Stumbo
Attorney General of Kentucky



G. Steven Rowe
Attorney General of Maine

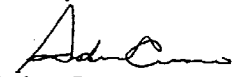


Martha Coakley
Attorney General of Massachusetts



Jeremiah W. Nixon
Attorney General of Missouri

Catherine Cortez Masto
Attorney General of Nevada



Andrew Cuomo
Attorney General of New York

Marc Dann
Attorney General of Ohio

Patrick Lynch
Attorney General of Rhode Island

Vincent Frazier
Attorney General of Virgin Islands

Hardy Myers
Attorney General of Oregon

William H. Sorrell
Attorney General of Vermont

Rob McKenna
Attorney General of Washington

CC:

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives

The Honorable Lamar S. Smith
Ranking Member
Committee on the Judiciary
U.S. House of Representatives

The Honorable Bobby Scott
Chairman
House Judiciary Subcommittee on Crime,
Terrorism, and Homeland Security
U.S. House of Representatives

The Honorable Randy Forbes
Ranking Member
House Judiciary Subcommittee on Crime,
Terrorism, and Homeland Security
U.S. House of Representatives

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
U.S. Senate

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
U.S. Senate

The Honorable Edward M. Kennedy
U.S. Senate

The Honorable Gordon Smith
U.S. Senate

STATE OF FLORIDA

BILL McCOLLUM
ATTORNEY GENERAL

April 16, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn Building
Washington, DC 20515

Dear Chairman Conyers,

I am writing to support your efforts to enact hate crimes legislation. As Chairman of the Crime Subcommittee in 1997, I joined you in cosponsoring the *Hate Crimes Prevention Act of 1997*, H.R. 3081. The bill you have introduced, the *Local Law Enforcement Hate Crimes Prevention Act of 2007*, H.R. 1592, contains many of the provisions we supported in the 105th Congress and the 106th Congress. Without commenting on any newly-added provisions in H.R. 1592, let me say that ten years have passed since we cosponsored the *Hate Crimes Prevention Act*, and it has yet to become law. It is time to properly punish those who cause or attempt to cause bodily injury to anyone because of a person's race, color, national origin, religion, gender, sexual orientation or disability.

As Attorney General of Florida, my office is charged with defending Florida's hate crimes statute. My office annually reports on the number of these crimes committed in Florida. In 2005, the overall number of reported hate crimes declined by 22.2 percent from the previous year, and that number represented the lowest annual total since reporting began in 1998. My office also conducts hate crimes training seminars for state and local law enforcement agencies throughout Florida. Through the end of 2005, more than 3,500 law enforcement personnel from more than 272 jurisdictions had received this training.

I appreciate your long-standing efforts to deter people from committing violent hate crimes. Please let me know if there is any way I may help in this shared goal.

Sincerely,

Bill McCollum

Mr. SHURTLEFF. You know, as chief law enforcement officers of our States and jurisdictions, we work very closely on the front lines to protect our citizens, both their civil rights as well as protect them from crime. And as we all reflect on the horrific event of yesterday—and, clearly, at this point, we do not know the motives involved in that circumstance—we are seeing that obviously first responders are State and local officials are now working with the Federal officials in figuring out what went on and how we might be able to address these and protect our citizens more fully.

So I am particularly interested today in coming before you and asking for your support in giving additional authority to Federal authorities. Now most often, you will see attorneys general come in and say, "Do not federalize every crime. We are on the front lines. We will do it. We do not need the Federal Government stepping in every chance they can and federalizing every thing." In this case, we believe it is very important. We need your help.

A number of States have passed similar hate crimes legislation over the years and, in fact, the 6 years I have been in office, we have worked every year diligently to try to pass an enforceable hate crime statute in the State of Utah. I am proud to say that last year, again, working across the aisle, we were able to do that. It was not what I had hoped for or the best law, but it is a good start.

The bottom line is we need additional Federal legislation in order to better protect our citizens and to be able to cooperatively work with Federal Government to determine which appropriate punishment is the most effective.

It is important in particular to amend Federal law, we believe, to include those additional categories and to make sure that those who commit these types of heinous crimes with premeditation and with a bias or prejudice, that we can prove beyond a reasonable doubt that they not just be engaged in a federally protected activity, but that we would be able to enhance the punishments if, in fact, we can show that bias or prejudice.

In the 6 years, I have testified every year both before statehouse and senate committees. We have addressed every one of these issues that you are now facing. They are important issues, and there is a great deal of concern over these types of things. In my written comments, I include an amended version of what I call the hate crimes primer because there is so much misinformation, there is so much important education that needs to go along with this.

This is what I used—and we used—in the State of Utah to pass effective, enforceable hate crimes legislation. I will just summarize this, if I can, in a few minutes some of those topics that I am talking about.

First and foremost, I think, is we need to begin with the correct definition of hate crimes. We are not asking you to pass crimes that punish hate, that punish thought. We all support the first amendment of the Constitution, the right for people to hate, the right for people to say mean and horrible things.

We are only supporting—in fact, this law, as proposed supports and makes a crime—actual criminal conduct—felonious, serious criminal conduct—that we as prosecutors can prove beyond a reasonable doubt was motivated by bias or prejudice against a particular group or member of that group.

Another common myth or concern is that there are different types of crime; we ought to treat all crimes the same. For hundreds of years of our criminal jurisprudence in this country, we have recognized that we treat different crimes differently. For example, let's say, God forbid, a child is killed by a drunk driver and another person's child is killed, raped and assaulted in a premeditated way. Both children are dead, and it does not mean disrespect to the child killed by the drunk driver that we have a different penalty attached, based on the motivation, circumstances, at the time of the crime.

So, clearly, it has been known in this country for hundreds of years that we punish, in the words of William Blackstone, those crimes most severely which are the most destructive of public safety and happiness, and literally, there is nothing more destructive of public safety than hate crimes, as recognized by the United States Supreme Court unanimous decision, a decision written by Chief Justice William Rehnquist in *Wisconsin v. Mitchell.*

Bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims and incite community unrest than any other. They are a more serious crime that should be punished more severely, and we strongly urge you to pass this legislation.

Thank you.

[The prepared statement of Mr. Shurtleff follows:]

PREPARED STATEMENT OF THE HONORABLE MARK L. SHURTLEFF

Testimony of Utah Attorney General Mark L. Shurtleff
Before the Subcommittee on Crime, Terrorism, and Homeland Security,
Committee on the Judiciary,
United States House of Representatives

H.R. 1592 – "Local Law Enforcement Hate Crimes Prevention Act of 2007"

Chairman Conyers and Members of the Committee:

My name is Mark Shurtleff, and I am the Attorney General of the State of Utah. Thank you for the opportunity to speak in support of H.R. 1592 – Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEHCPA). For the second year now, the Attorney General of Illinois, Lisa Madigan, and I have co-authored a bi-partisan letter signed by approximately half of state attorneys general communicating our strong support of Congressional efforts towards the immediate passage of federal hate crimes legislation.

As the chief legal officers in our respective jurisdictions, State Attorneys General are on the front lines in the fight to protect our citizens' civil rights. Although state and local governments continue to have the primary responsibility for enforcing criminal law, we believe that federal assistance is critical in fighting the invidious effects of hate crimes.

This much-needed legislation would remove unnecessary jurisdictional barriers to permit the United States Department of Justice to prosecute violent acts motivated by bias and hate and to enhance existing federal law by providing new authority for crimes where the victim is intentionally selected because of his or her gender, gender identity, sexual orientation, or disability. Under current law, the Justice Department can only prosecute crimes motivated by the victim's race, religion, or national origin when that person is engaged in a federally protected activity, such as voting. Legislative proposals, such as the LLEHCPA, however, would permit federal prosecution of hate crimes irrespective of whether they were committed while the victim was engaged in protective activities.

Removing this outmoded jurisdictional barrier to federal prosecution of hate crimes is critical to protecting our citizens' fundamental civil rights. In 2005, the most recent figures available, the FBI documented 7,163 incidents resulting in 8,795 crimes reported by 12,417 law-enforcement agencies across the country. However, I want to emphasize that it is not the frequency or number of hate crimes, alone, that distinguish these acts of violence from other crimes. Rather, our experiences as prosecutors have shown us that these crimes can have a special impact on victims, their families, their communities and, in some instances, the nation. Indeed, in *Wisconsin v. Mitchell*, 508 U.S. 47 (1993), Chief Justice William Rehnquist wrote for a unanimous Supreme Court upholding the constitutionality of enhanced penalties for crimes motivated by bias or hate against a person because of race, religion, color, disability, sexual orientation, national origin or ancestry. In so ruling, the court recognized that "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." Hate crimes have lead to the polarization of communities, increases in security needs at schools and churches, declines in property values and the creation of

an overall atmosphere of fear and distrust. All too often that climate has hindered the efforts of local law enforcement and placed the lives of police officers and civilians in jeopardy.

The need for comprehensive and effective hate crimes legislation is a matter of public safety and security as a critical tool in allowing law enforcement to protect all people equally. Opponents argue incorrectly that H.R. 1592 will make hatred a crime, will punish thought, will create special protected classes of people, or is part of a "militant gay rights agenda." As Utah Attorney General, I worked for six years with both sides of the isle and with representatives of all races, religions, and sexual orientations, to pass an enforceable hate crimes law in Utah. We faced each of those false allegations. To assist our legislature and the public in understanding the truth about hate crimes legislation, and in recognition that an important part of the legislative process is one of education, I prepared and distributed a document in the format of a school "primer" organized by subject. I offer here an edited version of that primer in the hopes it will prove helpful in your deliberations and decision making with regard to this important bill.

"WE HOLD THESE TRUTHS . . ."
A "HATE CRIMES" PRIMER
By Utah Attorney General Mark L. Shurtleff

Chapter I. Current Events (*The Worst "Hate Crime" in U.S. History*)

There were more victims on September 11, 2001 than the three thousand souls who perished that day. Every American felt victimized by the hatred those terrorist criminals had for our national identity. We all asked, "Why do they hate us so?" And when they acted on that hate, we all felt fear, and our economy suffered terribly. Our fear naturally turned to anger and a lust for revenge. The perpetrators that day targeted not the individuals on the planes and in the Twin Towers, but rather who they were – Americans. In the same way, every bias motivated crime is targeted at a larger audience than the individual victim. Because an entire group of people is victimized by hate crimes, and the widespread negative results of such crimes, H.R. 1592 provides a tool to more effectively and more severely punish the perpetrators.

Chapter II. History (*"We Hold These Truths to be Self-Evident. . ."*)

America's founding fathers, and the inspirational documents they crafted, are sometimes incorrectly cited in opposition to "hate crimes" legislation. The birth of our Republic arose out of a truly "revolutionary" concept. After more than a century of monarchial and aristocratic rule, the founding fathers reasoned that it was "self-evident" that human rights, like life, liberty and the pursuit of happiness, were not the benevolent right of kings, but inalienable, and given by God to all men equally; and that government was instituted solely to secure or protect those rights.

Those great leaders changed the history of the world for the better and established a system of government ruled by law that has stood the test of time and guaranteed

unbelievable freedoms and opportunities. However, many of them went to their graves regretting that they could do no more than give mere lip service to the first self-evident truth that "all men are created equal." The Declaration of Independence was fueled by the conviction that the ensuing Revolution would sweep slavery off the American continent. Although slavery was decried as "an odious bargain with sin," a "curse," a "crime," and was anathema to republican ideology; in the end the self-evident truth of **equality** remained the self-evident reality of **slavery**. It would take "four score and seven years" for a leader with the courage to match his convictions, Abraham Lincoln, to actually breath life and truth into the proposition that all men are created equal, and end the odious "hate crime" of slavery.

Another hundred years passed before courageous statesmen would put principal above politics and the force of law behind the promise of equality. Today, eleven score and eleven years after the inspired declaration of truth, hate remains strong, and some Americans continue to commit crimes motivated by bias and prejudice against individuals which impact entire communities, and which are, therefore, anathema to the concept that all men are created equal. It behooves us who govern by the consent of the people to rise to the occasion and pass H.R. 1592 to better protect the people from those who thumb their noses at those self-evident truths of equality in life, in liberty and in the pursuit of happiness.

Chapter III. Politics (*The Proper Role of Government*)

Having won their independence, the people of the United States set about the task of forming "a more perfect Union," by establishing a Constitution that would, first and foremost, "establish justice [and] ensure domestic tranquility." Justice means equality under the law and refers to the paramount obligation of the courts to ensure that all persons are treated fairly. Domestic tranquility equates to public safety. Thomas Jefferson declared that "a wise and frugal government . . . shall restrain men from injuring one another." In the pamphlet entitled *The Proper Role of Government,* former U.S. Secretary of Agriculture Ezra Taft Benson, stated that "government becomes primarily a mechanism for defense against bodily harm, theft and involuntary servitude," and that it is proper for government to deprive one of life, liberty, or property to only "punish crime and provide for the administration of justice." H.R. 1592 provides a needed tool to establish justice, better restrain and punish criminals, and defend and protect all Americans.

Chapter IV. English (*The Correct Definition of "Hate Crimes"*)

Let's get back to the basics: "hate crimes" is a misnomer. Laws like H.R. 1592 do not create any new crimes. They do no punish people for hating. They simply provide a tool to the judicial system to enhance or increase the penalty if the trier of fact determines beyond a reasonable doubt that a crime was committed against the victim primarily because of actual bias or prejudice against a group to which that victim belongs. The prosecution must prove that the defendant demonstrated the bias or prejudice at the time the crime was committed. It must show more than just evidence of an abstract belief,

membership in an organization, or expressions of hatred. That evidence must be "specifically related" to the offense.

Chapter V. Math (*Worse Crime = More Time*)

One of the common fallacies used against hate crimes laws is that they aren't needed because "all crimes are hate crimes." In fact, most crimes are not motivated by hate, bias or prejudice. Many crimes are motivated by greed, some by anger, and others by a brief, overwhelming passion. And the truth of the matter is that now, and for hundreds of years in our system criminal jurisprudence and thought, we have applied different degrees of punishment for the same crime depending on different motives. So-called hate crime laws simply add a motive of bias or prejudice to that system.

In unanimously upholding the constitutionality of hate crime laws, the United States Supreme Court cited 18th Century jurist William Blackstone's Commentaries: "It is but reasonable that among crimes of different natures those should be most severely punished which are the most destructive of the public safety and happiness." Wisconsin v. Mitchell, 113 S.Ct. 2194, 2201 (1993). Blackstone was right, and the courts have long recognized that crimes motivated by bias or prejudice against a group is most destructive of public safety and the pursuit of happiness.

Blackstone's writings played an important role in the founding of our nation. Some authors have noted that the "self-evident," "unalienable rights" in the Declaration of Independence probably came from Blackstone's writings and that the founders "found their philosophy in John Locke and their passion in Thomas Paine, but they found the blueprint for a new nation in Blackstone." Abraham Lincoln said that he decided to become a lawyer after reading the first forty pages of Blackstone's Commentaries and often referred people to read it, "twice," as "the best mode of obtaining a thorough knowledge of the law."

Like the heinous acts of September 11th, bias-motivated crimes "inflict greater individual and societal harm . . . [and] are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." So stated "conservative" Chief Justice William Rehnquist in writing the unanimous decision in Wisconsin v. Mitchell, *id.*

Chapter VI. Law (*"Hate Crimes" Legislation is Constitutional*)

A. Equal Protection

Some people oppose laws like H.R. 1592 because they wrongly believe that they create special rights for special groups thereby violating the equal protection clause and the "all men are created equal" declaration. The truth is that hate crimes laws have never been written nor enforced to protect just "Blacks," "Jews," or "homosexuals." They apply equally across the board to everyone because we all belong to protected groups: "race, color, religion, sexual orientation, national origin, ancestry, age, or gender." Some

opponents of these laws claim the enhanced penalty will only be used to protect minorities and that a "white male Protestant" will not be protected. The claim has no basis in the law or in fact. Of the 4,895 crimes reported in 2005 as racially-motivated, 19.9 percent were anti-white. Of the 1,405 religiously motivated crimes, 8.4% were against Christians. In fact, in Wisconsin v. Mitchell, the defendant, a black man, received a stiffer sentence for committing a "hate crime" against a white man.

B. Free Speech

Hate crimes laws like H.R. 1592 do not punish bigoted thought! It does not punish speech or expression! "Hate crimes" are not "thought crimes!" H.R. 1592 only punishes affirmative criminal conduct. It has been repeatedly held that "the First Amendment does not protect violence." (See e.g. NAACP v. Claiborne Hardware Co., 102 S.Ct. 3409, 3427 (1982.) Again, the motive or the thoughts of an alleged criminal have long been ruled admissible for sentencing purposes. Citing several cases, the Supreme Court in Wisconsin v. Mitchell, *supra,* at 2199, explained that "it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives . . . Thus, in many States the commission of a murder . . . for pecuniary gain is a separate aggravating circumstance."

1. "A Black Face in a White Place."

Sadly there is still plenty of hate in our nation. I heard a man on a Utah radio station declare that former state representative Duane Bordeaux, who is African-American, was "a black face in a white place and we don't want his kind here!" While that attitude disgusts me, and most Utahns, I will defend that man's constitutional right to hate and even to express that hatred on the radio. But if he were to come to the Capitol and push Representative Bordeaux over the balcony, and I could prove beyond a reasonable doubt to a jury that he did it because of prejudice against his race, I would like the tool to keep that man locked up away from our good citizens for a longer period of time. For purposes of H.R. 1592, I would like the opportunity to staff that case with my federal counterparts and determine which system offered the most effective punishments.

2. "Remember to Have Them Castrated."

Not long after September 11, I warned a national airline that it could not discriminate based on the appearance of "Arab-looking men" and refuse to let them fly. A Utah woman who claimed to have a degree from one of our universities wrote me in anger. "I know Arabs," she claimed. "They are not to be trusted! They will kill you . . . They are devils and black Satanists . . . They have ripped off good people . . . I have a right to live Muslim free . . . send them back to that black place [Middle East] . . . but first remember to have them castrated so they can't spread their hate to another generation." Again, while I am saddened and disturbed by her hatred, she has a right to send me an email expressing it. But if she were to take up a knife and carry out her plan on a Muslim, and I could prove in court that she committed a violent assault because of

her prejudice, then I would need the tool to keep her away longer from the communities she harmed, and other peaceful law-abiding citizens.

Chapter VII. Ethics (*Why Include Sexual Orientation?*)

Many people have asked me why, given my Republican political philosophy and religious beliefs, I could support including a "protection for sexual orientation." They claim that supporters of hate crimes laws that include sexual orientation as a protected category are motivated by the "militant gay rights movement," and this is just a step in their "plan" to obtain special rights or status. H.R. 1592 does not create any legal right or status based on sexual orientation, and it does not address the controversial issue of whether homosexuality is a "choice." It doesn't have to. It simply says that it is never okay to assault a gay or lesbian because they are homosexual. It seems we could all agree to that.

I believe the vast majority of Americans stand for tolerance, acceptance and love, and that regardless of whether one believes that homosexuality is a choice, a biological predisposition, or a "sin," it would be a moral outrage to send a message that it is okay to assault or commit other crimes against homosexuals. Failing to include sexual orientation in the federal list of categories would send that awful message.

Those who argue most loudly against including sexual orientation, have alleged that most "hate crimes" charged are for anti-gay crimes. That is also incorrect. Of the 8,850 bias motivated offenses reported in 2005, 69.7% were motivated by racial, ethnic or national origin bias. 15.7% were motivated by religious prejudice; and 14% by sexual-orientation bias. Of the latter there were twenty reported cases of anti-heterosexual bias.

Epilogue

As the chief legal and law enforcement officers of our respective states, we are mindful that the overwhelming majority of criminal cases should be brought by local police and prosecutors at the state level. However, in those rare situations in which local authorities are unable to act, measures such as the LLEHCPA provide a backstop to state and local law enforcement by allowing federal involvement if it is necessary to provide a just result. These measures would provide invaluable tools to federal law enforcement to help state authorities in their fight against hate crimes. Therefore, we strongly urge the passage of important hate crimes legislation by the 110th Congress.

Mr. NADLER. And I thank the gentleman.
Mr. Lynch?

TESTIMONY OF TIMOTHY LYNCH, DIRECTOR, PROJECT ON CRIMINAL JUSTICE, CATO INSTITUTE

Mr. LYNCH. Thank you, Mr. Chairman. I appreciate the invitation to share my views with the Committee this afternoon.

I know our time is short, so I am just going to outline three reasons why I think the proposed bill ought to be rejected: First, as a matter of law, the bill is inconsistent with our constitutional structure. Second, as a matter of policy, the bill is not necessary. And three, it is actually counterproductive. I think the bill is actually going to create more problems than it is going to solve.

The bill is unconstitutional because it violates the legal doctrine of federalism. The 10th amendment to our Constitution says that the powers that are not delegated to the Federal Government are reserved to the States.

Fighting crime is obviously a very important governmental responsibility, but it is one of those powers that was reserved to the State governments. Chief Justice John Marshall said it was clear that murders and felonies generally could not be punished by the Congress under our Constitution.

As we know, the Federal criminal code has nevertheless expanded over the years. Past Congresses have relied upon the Commerce Clause to federalize crimes that are already on the books at the State and local level. But, from a historical perspective, much of that expansion has occurred in recent years. According to a report by the American Bar Association, more than 40 percent of the Federal criminal laws that have been enacted since the Civil War have been enacted just in the last 30 years.

More importantly, the Supreme Court declared the Violence Against Women Act unconstitutional in 2000. In the *Morrison* case, the court said that if Congress could regulate gender-motivated violence, it could follow that Congress could bring murder and all of the other violent offenses within the Federal sphere. Since the Court is going to preserve the Constitution's distinction between what is national and what is local authority, I expect the Supreme Court would invalidate this bill following the rationale of the *Morrison* ruling.

But even if we put this fundamental constitutional principle to one side, I think there are additional reasons to reject the proposed legislation. This law is not necessary. All of the violent acts that would be covered by the bill—arson, explosive devices, shooting people—are already on the books, and these offenses are investigated and prosecuted every day.

The bill is called the Hate Crimes Prevention Act, but it is not going to prevent anything. Any thug who is already inclined to stab or shoot another human being is not going to put down his weapon because Congress passes some new law.

The argument has been made that hate crimes are different because they affect not only just the victim, but the entire community. Now, for some hate crimes, I think that is undeniably true, but the same thing can be said for other crimes as well, and the

tragedy at Virginia Tech University yesterday, I think, is an example of this.

I heard reporters last night and this morning talk about that it is not just the students who were shot and wounded and their families that are grieving. It is that entire Virginia Tech campus. The entire campus of 20,000 people has been deeply impacted by what happened.

Now some people argue that there is no harm in passing a bill like this. Some people I have debated over the years on hate crimes have said, "Well, look, maybe this law will have a positive impact. Maybe it will not. Why not give it a try?" They do not see any downside to enacting bills like this. I think that view is mistaken because I think this bill can actually create more problems than it will solve.

Now, given our time constraints, I will mention my most serious concern in this regard. I think the FBI needs to stay focused on al-Qaeda and terrorist groups. Former Attorney General Richard Thornburgh has made the point that one of the reasons the 9/11 terrorists were able to avoid detection prior to the attacks was because the FBI had gotten distracted by other missions assigned by the Congress. Federal law enforcement resources are limited. Every time a State offense is federalized, investigative resources are distracted from the fight against terrorism into investigating street crimes.

In my view, the primary reason we have not suffered another terrorist attack here at home is because our defense and law enforcement agencies have been very vigilant when it comes to investigative leads having to do with terrorists, sleeper cells that might be here on U.S. soil. We need to maintain this vigilance.

I know 5 years have passed since the 9/11, but we have to remember that it took 8 years. Eight years passed between that initial attack on the World Trade Center in 1993 and when the terrorists came to finish the job in 2001.

Let me conclude with one final point. At the end of the day, there is a supposition to the idea of bias crimes, and that is the proposition that vicious crimes that are motivated by a hatred, rooted in jealousy, envy and greed should be punished less severely than crimes that are motivated by racial and religious prejudice. It is not necessary or desirable for a hierarchy of hatred to be written into our criminal code.

Thank you.

[The prepared statement of Mr. Lynch follows:]

PREPARED STATEMENT OF TIMOTHY LYNCH

STATEMENT of

Timothy Lynch
Director
Project on Criminal Justice
The Cato Institute

before the

Subcommittee on Crime, Terrorism, and Homeland Security

The Hate Crimes Prevention Act of 2007

April 17, 2007

Mr. Chairman, distinguished members of the committee: My name is Timothy Lynch. I am director of the Cato Institute's Project on Criminal Justice. I want to thank the committee for inviting me to testify on the question of whether Congress should enact additional hate crimes legislation.

I believe the proponents of hate crimes legislation have good and honorable intentions. They would like to see less bigotry and more good will in American society. While I share that goal, I believe Congress should decline the invitation to enact hate crimes legislation for both constitutional and practical reasons.

A. Constitutional Objection

The U.S. Constitution created a federal government of limited powers. As James Madison noted in the Federalist no. 45, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Most of the federal government's "delegated powers" are specifically set forth in article I, section 8. The Tenth Amendment was appended to the Constitution to make it clear that the powers not delegated to the federal government "are reserved to the States respectively, or to the people."

Crime is serious problem, but under the U.S. Constitution it is a matter to be handled by state and local government. In *Cohens v. Virginia*, 6 Wheat (19 U.S.) 264 (1821), Chief Justice John Marshall observed that Congress had "no general right to punish murder committed within any of the States" and that it was "clear that congress cannot punish felonies generally." Unfortunately, as the years passed, Congress eventually assumed the power to enact a vast number of criminal laws pursuant to its power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[1]

In recent years, Congress has federalized the crimes of gun possession within a school zone, carjacking, wife beating, and female genital cutting. All of that and more has been rationalized under the Commerce Clause.[2] In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court finally struck down a federal criminal law, the Gun-Free School Zone Act of 1990, because the connection between handgun possession and interstate commerce was simply too tenuous.[3] In a concurring opinion, Justice Clarence Thomas noted that if Congress had been given authority over matters that simply "affect" interstate commerce, much if not all of the enumerated powers set forth in article I, section 8 would be surplusage. Indeed, it is difficult to dispute Justice Thomas' conclusion that an interpretation of the commerce power that "makes the rest of §8 surplusage simply cannot be correct."

This Congress should not exacerbate the errors of past Congresses by federalizing more criminal offenses. The Commerce Clause is not a blank check for Congress to enact whatever legislation it deems to be "good and proper for America." The proposed hate crimes bill is simply beyond the powers that are delegated to Congress.

B. Policy Objections

Beyond the threshold constitutional problem, there are several other reasons why Congress should decline the invitation to enact hate crimes legislation. First, it is imperative that federal law enforcement focus on foreign threats, such as al-Qaeda. One of the reasons that the terrorists were able to elude detection prior to the September 11 attacks was that the FBI was trying to do so many things that it lost sight of its most important responsibility–protecting the homeland from foreign threats. But, as former Attorney General Richard Thornburgh has noted, the FBI was only trying to respond to the additional missions that the Congress assigned to it: "In the last several decades, [Congress] has added federal criminal laws at a faster rate than ever before in American history ... These new statutes have the capacity to absorb limited federal resources in the pursuit of what are, in many cases, state offenses dressed up as federal crimes."[4]

Second, all of the violent acts that would be prohibited under the proposed bill are already crimes under state law. Over the last few years, there has been a great deal of publicity surrounding the brutal killings of James Byrd in Texas and Matthew Shepard in Wyoming. The individuals responsible for those murders were quickly apprehended and prosecuted by state and local authorities. Those incidents do not show the necessity for congressional action; to the contrary, they show that federal legislation is unnecessary.[5]

Third, a federal law is not going to prevent anything. Any thug that is already inclined to hurt another human being is not going to lay down the gun or knife because of some new law passed by Congress. The culprits involved in the killings of James Byrd and Matthew Shepard, for example, made a conscious decision to disregard basic homicide statutes. And those murders took place in states that have the most drastic legal sanction available under the law--the death penalty. The notion that any federal hate crime law could have prevented those brutal killings is naïve.

Fourth, it is important to note that the whole concept of "hate crimes" is fraught with definitional difficulties. Hate crimes generally refer to criminal conduct motivated by prejudice.[6]

Should all prejudices be included in the hate crime definition--or only a select few? The Columbine school shooting illustrates this problem. According to news reports, one of the groups targeted by the deceased teenage culprits was athletes. If the athletes had been the sole targets of the school shooting, such a crime would not have been considered a hate crime in any jurisdiction (federal or state). And yet we can be fairly certain that the perpetrators of the Colorado rampage were filled with hatred toward "jocks." For the proponents of hate crime laws, the dilemma is this: if some groups (women, gays, environmental political activists, whatever) are left out of the "hate crime" definition, they will resent the selective depreciation of their victimization. On the other hand, if all victim groups are included, the hate crime category will be no different than "ordinary" criminal law.[7]

Fifth, proponents of hate crime legislation believe that such laws will increase tolerance in our society and reduce intergroup conflict. I believe hate crime laws may well have the opposite effect. That's because the men and women who will be administering the hate crime laws (e.g. police, prosecutors) will likely encounter a never-ending series of complaints with respect to their official decisions. When a U.S. Attorney declines to prosecute a certain offense as a hate crime, some will complain that he is favoring the groups to which the accused belongs (e.g. hispanic males). And when a U.S. Attorney does prosecute an offense as a hate crime, some will complain that the decision was based upon politics and that the government is favoring the groups to which the victim belongs (e.g. Asian Americans). This has happened in some of the jurisdictions that have enacted hate crime laws at the local level. For example, when then New York City Mayor David Dinkins characterized the beating of a black man by white Jewish men as a hate crime in 1992, the Jewish community was outraged.[8] Jewish community leaders said the black man was a burglar and that some men were attempting to hold him until the police could take him into custody. The black man did not want to go to jail, so he resisted--and the Jewish men fought back. Incidents such as that illustrate that actual and perceived bias in the enforcement of hate crime laws can exacerbate intergroup relations.

Sixth, hate crimes legislation will take our law too close to the notion of thought crimes. It is true that the hate crime laws that presently exist cover acts, not just thoughts. But once hate crime laws are on the books, the law enforcement apparatus of the state will be delving into the accused's life and thoughts in order to show that he or she was motivated by bigotry. What kind of books and magazines were found in the home? What internet sites were bookmarked in the computer? Friends and co-workers will be interviewed to discern the accused's politics and worldview. The point here is that such chilling examples of state intrusion are avoidable because, as noted above, hate crime laws are unnecessary in the first place.

The claim will doubtless be made that such problems can be avoided by "sound prosecutorial discretion" with respect to the application of hate crimes legislation. Congress should not accept that bland assurance. Consider, for example, a hate crime prosecution from Ohio. The case involved an interracial altercation at a campground and here is how the prosecutor questioned the white person accused of a hate crime:

Q. And you lived next door ... for nine years and you don't even know her first name?

A. No

Q. Never had dinner with her?

A. No

Q. Never gone out and had a beer with her?
A. No. ...

Q. You don't even associate with her, do you?

A. I talk to her when I can, whenever I see her out.

Q. All these black people that you have described as your friends, I want you to give me one person, just one who was a really good friend of yours.[9]

This passage highlights the sort of inquisitorial cross-examination that may soon become common whenever an accused person takes the witness stand to deny a bias or hate charge that has been lodged against him or her.

In *People v. Lampkin*, 457 N.E.2d 50 (1983), the prosecution presented as evidence racist statements that the defendant had uttered six years before the crime for which he was on trial. This case raises the question of whether there is going to be statute of limitations for such behavior? For example, it is not uncommon for teenagers to entertain various prejudices for brief periods and then discard them as they mature into adulthood. Is a stupid remark uttered by a 16 year-old on an athletic field going to follow that person around the rest of his or her life? Shouldn't our law make room for the possibility that people can exhibit some variation of bigotry in life--but then change?

The good news for Congress is this: all of the problems outlined above are avoidable because hate crime legislation is unnecessary in the first place.

C. Conclusion

For all of the above stated reasons, I would urge Congress not only to decline the invitation to pass another hate crimes bill, but to repeal all existing federal hate crime laws.

Notes

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[1] See *The Federalization of Criminal Law* (American Bar Association, 1998). See also John S. Baker, *Measuring the Explosive Growth of Federal Crime Legislation* (The Federalist Society for Law and Public Policy Studies, 2005).
[2] See Gene Healy and Timothy Lynch, "Power Surge: The Constitutional Record of George W. Bush (Cato Institute, 2006)", and Timothy Lynch, "Dereliction of Duty: The Constitutional Record of President Clinton," Cato Institute Policy Analysis no. 271, March 31, 1997, pp. 37-43.
[3] See also *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000).

[4] Richard Thornburgh, "Well Before Sept. 11, Congress Overtaxed the FBI," *New York Times*, June 29, 2002.

[5] If convincing evidence were presented to Congress that state officials were enforcing the local criminal law in an uneven manner so that certain citizens were being deprived of the equal protection of the law, Congress can (and should) invoke its legislative power under section 5 of the Fourteenth Amendment. I hasten to add, however, that a federal "hate crimes" law would be an inappropriate response to such a situation--for all of the other reasons outlined herein.

[6] See Eric Pooley, "Portrait of a Deadly Bond," *Time*, May 10, 1999, p. 26.

[7] See generally James B. Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press, 1998).

[8] See Mary B.W. Tabor, "Black is Victim of Beating By Hasidim in Crown Heights," *New York Times*, December 2, 1992, p. B3; Jane Fritsch, "Police Dept. Vows Caution in Labeling Crimes as Bias Cases," New York Times, December 22, 1992, p. A1.

[9] See Richard Dooling, "Good Politics, Bad Law," *New York Times*, July 26, 1998 (quoting *State v. Wyant*, 597 N.E.2d 450 (1992), vacated and remanded, 113 S.Ct. 2954 (1993), reversed, 624 N.E.2d 722 (1994)).

Mr. NADLER. I thank the gentleman.

Our next witness is Dean Lawrence.

TESTIMONY OF FREDERICK M. LAWRENCE, DEAN, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. LAWRENCE. Thank you, Mr. Chairman.

Mr. Chairman, I am honored to be asked to testify here today in support of H.R. 1592, the Hate Crimes Prevention Act.

Mr. Lynch has called up the concerns of terrorism and the post-9/11 world. I would say that it is precisely because we live in a post-9/11 world that we have to remember precisely what is most precious about this society, and that is the right not only to be different and to be an American, as one who chooses to be an American, but to be safe and physically secure. It is precisely that that underpins what this legislation is about.

There are a number of issues that this legislation raises, Mr. Chairman. I would like to, in my brief time here, address four.

First, much is said of "Why punish motivation?" We punish motivation in a bias crime law, such as the Hate Crimes Prevention Act, not because we are punishing thoughts; we are punishing harm, and it is precisely the motivation of a bias crime that makes the harm worse.

I would say two additional things about motivation that we should focus on. One is that motivation is the key to the definition of bias crimes because, in fact, that is what causes the greater harm to the individual, to the entire target community, to the society.

The second is that we are not breaking new ground here when we look at a motivation in the criminal law. As General Shurtleff said earlier, motivation has always been looked at, and it is not just that it says who is more punishable; it actually says whether the harm is worse.

The great Justice Oliver Wendell Holmes observed, "Even a dog knows the difference being tripped over and being kicked." It could be the exact same physical injury, but the difference between being tripped over and kicked over is that notion of a personal physical invasion of the self and that a hate crime is precisely not just being kicked because of where you are or who you are; it is being kicked because of what you are.

I would also add that a whole host of civil rights statutes dealing with employment and housing and a whole array of antidiscrimination laws turned precisely on motivation and the issue of motivation. An act of firing an individual in most States that could be perfectly legal for any reason becomes illegal because of the motivation of the actor.

Similarly, when we turn to my second issue, that of free expression and the first amendment, as has been said earlier, in Wisconsin against Mitchell, a unanimous Supreme Court upheld the constitutionality of a bias crime law. And why? Because, as Chief Justice Rehnquist said, we are not punishing thoughts. We are punishing action. We are not punishing expression. We are punishing the acting on those expressions in a violent way.

Similarly, when the Supreme Court upheld the cross burning statute in Virginia, in Virginia against Black, the court said that one may focus on act, not on expression of ideas.

And the concern that had been raised earlier with respect to complicity, what about those who give speeches that others may rely on? Complicity is a well-known doctrine in the criminal law that requires an intent to see the crime happen.

There will be no punishment under this statute or any statute for someone expressing views. There will certainly be the potential for punishment for someone who acts with the intent to see a bias crime happen, and there should be.

This law would add to the arsenal of Federal law protectin gender, sexual orientation, gender identity and disability. All of these are aspects of violence that we have seen in the society. They have been measured by the FBI pursuant to its authority under the Hate Crimes Statistic Act and by private civil rights groups, such as the Anti-Defamation League and the Human Rights Campaign, in monitoring the existence of bias crimes.

The inclusion of gender, sexual orientation, gender identity and disability in the Hate Crimes Prevention Act fills an important gap left in Federal bias crime law enforcement, both by the Violent Crime Control and Law Enforcement Act of 1994 and by the Civil Rights Act of 1968.

Let me conclude, Mr. Chairman, by addressing the federalism issues. First as to the Constitution, the constitutional basis for this statute is found with respect to many of the groups, particularly race and ethnicity, in the 13th amendment, but with respect to all of the groups in the Commerce Clause.

Mr. Lynch mentioned earlier the *Morrison* case in which the court struck down the Violence Against Women Act, but, in fact, precisely what the court said in *Morrison* is there was no jurisdictional predicate in that law, and this bill precisely had a jurisdictional predicate. So there certainly is jurisdictional authority.

With respect to the relations between Federal and State governments, I would say several things. First of all, those who would protect the province of local law enforcement would do well to listen to district attorneys and attorneys general who have embraced this legislation, as we just heard earlier. Secondly, all we would do is bring bias crimes within the realm of law enforcement generally, where Federal and State entities have managed to work together in a cooperative way.

What we would expect is what I saw as an assistant U.S. attorney for 5 years in the Southern District of New York where local and Federal authorities worked together, and depending on the case, depending on who has the best statute, the case will be brought appropriately. This law will permit that to happen.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF FREDERICK M. LAWRENCE

Statement by Frederick M. Lawrence
Dean and Robert Kramer Research Professor of Law,
George Washington University Law School
Committee on the Judiciary House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security
Concerning H.R. 1592
April 17, 2007

Mr. Chairman and Members of the Committee:

I am honored by the opportunity to testify today on the issue of bias-motivated violence, more commonly known as hate crimes, and in support of H.R. 1592, the Local Law Enforcement Hate Crimes Prevention Act of 2007 ("Hate Crime Prevention Act"). My name is Frederick M. Lawrence. I am the Dean of The George Washington University Law School where I am the Robert Kramer Research Professor of Law. Before joining The George Washington University faculty in 2005, I was Professor of Law at Boston University School of Law where I was a member of the faculty since 1988. Prior to joining the Boston University faculty I served for five years as an Assistant United States Attorney for the Southern District of New York. From 1986-88 I was the Chief of the Civil Rights Unit of that office. A key focus of my career has been federal civil rights enforcement and civil rights crimes. My book on the subject of bias crimes, Punishing Hate: Bias Crimes Under American Law, was published by Harvard University Press.

I would like to express today my strong support for the proposed legislation to enact 18 U.S.C. §249 to augment the current federal law in 18 U.S.C. §245 that reaches crimes in which bias crime victims have engaged in one of six narrowly defined "federal protected activities." The proposed legislation will also extend the protection of federal law to bias crimes motivated by the victim's sexual orientation, gender, gender identity or disability. This legislation is not only permitted by doctrines of criminal and constitutional law but I believe it is mandated by our societal commitment to equality.

Bias crimes are a scourge on our society. Is there a more terrifying image in the mind's eye than that of the burning cross? Crimes that are motivated by racial hatred have a special and compelling call on our conscience. When predominantly Black churches were in flames across the South during the summer of 1996, it took only a matter of weeks for Congress to enact and the President to sign the Church Arson Prevention Act of 1996.[1] The Hate Crime Prevention Act will take its place in the evolving Federal statutory response to bias-motivated violence; by some measures it will be the most important piece of Federal criminal civil rights legislation in nearly forty years, and, in some ways, the most important such legislation since Reconstruction. The proposed legislation raises many significant questions that implicate fundamental American values, including free expression, and federalism. I will focus on four inter-related questions:

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[1] Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392, amending 18 U.S.C. §247.

(i) is it appropriate for a criminal law to punish on the basis of a perpetrator's motivation?
(ii) should gender, sexual orientation, gender identity, and disability be included in a federal bias crime law?
(iii) are bias crime laws consonant with principles of free expression? and
(iv) is a prominent federal role in the prosecution and punishment of bias crimes consistent with the proper division of authority between state (and local) government and the federal government in our political system?

I offer a firm answer in the affirmative to each of these questions. The punishment of bias crimes, with a substantial federal enforcement role, is not only permitted by doctrines of criminal law and constitutional law, it is mandated by our societal commitment to the equality ideal.

I. Motivation as an Element of Bias Crimes

Bias crimes are distinguished from "parallel crimes" (similar crimes lacking bias motivation) by the bias motivation of the perpetrator. A "gay bashing" is the parallel crime of assault with bias-motivated on the basis of sexual orientation. A cross burning on the lawn of a Black family is the parallel crime of vandalism or criminal menacing with racial motivation. Ordinarily, the criminal law is far more concerned with the perpetrator's culpability -- did he, for example, act purposely, recklessly, negligently, or only accidentally -- rather than the actor's motivation for his criminal acts. In the case of bias crimes, however, as with a select group of crimes where motivation is deemed relevant -- motivation is a critical and valid part of the definition of a crime.

Motivation is a critical part of the definition of bias crimes because it is the bias motivation of the perpetrator that caused the unique harm of the bias crime. I will first address the way in which the resulting harm of a bias crime exceeds that of a parallel crime on each of three levels: the nature of the injury sustained by the immediate victim of a bias crime; the palpable harm inflicted on the broader target community of the crime; and the harm to society at large. I will then turn to the question of whether motivation may be punished. This question is distinct from the related question of whether punishment of bias crimes is consonant with the First Amendment right to free expression which I shall address below.

Motivation and the Harm Caused by Bias Crimes

Impact of Bias Crimes on the Immediate Victims

Bias crimes may be distinguished from parallel crimes on the basis of their particular emotional and psychological impact on the victim. The victim of a bias crime is not attacked for a random reason -- as is the person injured during a shooting spree in a public place -- nor is he attacked for an impersonal reason -- as is the victim of a mugging for money. He is attacked for a specific, personal reason. Moreover, the bias

crime victim cannot reasonably minimize the risks of future attacks because he is unable to change the characteristic that made him a victim.

Bias crimes thus attack the victim not only physically but at the very core of his identify. It is an attack from which there is no escape. It is one thing to avoid the park at night because it is not safe. It is quite another to avoid certain neighborhoods because of, for example, one's race or religion. This heightened sense of vulnerability caused by bias crimes is beyond that normally found in crime victims. Bias crime victims have been compared to rape victims in that the physical harm associated with the crime, however great, is less significant than the powerful accompanying sense of violation.[2] The victims of bias crimes thus tend to experience psychological symptoms such as depression or withdrawal, as well as anxiety, feelings of helplessness and a profound sense of isolation.[3] One study of violence in the work-place found that victims of bias-motivated violence reported a significantly greater level of negative psycho-physiological symptoms than did victims of non-bias motivated violence.[4]

The marked increase in symptomatology among bias crime victims is true regardless of the race of the victim. The psychological trauma of being singled out because of one's race exists for white victims as well as members of minority groups.[5] This is not to suggest, however, that there is no difference between bias crimes committed by white perpetrators against people of color and those bias crimes in which the victim is white. A difference exists between Black and Hispanic victims and white victims concerning a second set of factors -- that is, defensive behavioral changes. Although bias crimes directed at minority victims do not produce a greater level of psychological damage than those aimed at white victims, they do cause minority bias crime victims to adopt a relatively more defensive behavioral posture than white bias crime victims typically adopt.[6]

The additional impact of a bias-motivated attack on a minority victim is not due solely to the fact that the victim was selected because of an immutable characteristic. This much is true for all victims of bias crimes. Rather, the very nature of the bias motivation, when directed against minority victims, triggers the history and social

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[2] Joan Weiss, "Ethnoviolence: Impact Upon the Response of Victims and the Community," in Bias Crime: American Law Enforcement and Legal Response, 174, 182 (1993).

[3] *See, e.g., See also* Training Guide for Hate Crime Data Collection: http://www.fbi.gov/ucr/traingd99.pdf; Weiss, Bias Crime, 182-183; Melinda Henneberger, "For Bias Crimes, a Double Trauma," Newsday, Jan. 9, 1992, at 113; N. R. Kleinfield, "Bias Crimes Hold Steady, But Leave Many Scars," New York Times, Jan. 27, 1992, at A1.

[4] Joan C. Weiss, Howard J. Ehrlich, Barbara E. K. Larcom, "Ethnoviolence at Work," 18 Journal of Intergroup Relations, 28-29 (Winter 1991-92).

[5] *Id.* The data collected for the study of bias-motivated violence at work was analyzed by ethnicity. There was no statistically significant difference among whites, blacks, and Hispanics in the average number of psychological symptoms experienced as a result of being the victim of bias-motivated violence. *Id.*, 29. Moreover, the rates of "ethnoviolent victimization" among whites and blacks in the study were approximately the same. *Id.*, 23.

[6] *Id.*, 29. The defensive behavior changes included such items as staying home at night more often, watching children more closely, trying to be "less visible," or moving to another neighborhood. *Id.*, 27-28.

context of prejudice and prejudicial violence against the victim and his group. The bias component of crimes committed against minority group members is not merely prejudice per se but prejudice against a member of a historically oppressed group. In a similar vein, Charles Lawrence, in distinguishing racist speech from otherwise offensive words, described racist speech as words that "evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see."[7] Minority victims of bias crimes therefore experience the attack as a form of violence that manifests racial stigmatization and its resulting harms.

Stigmatization has been shown to bring about humiliation, isolation and self-hatred.[8] A individual who has been racially stigmatized will often be hypersensitive in anticipation of contact with other members of society whom he sees as "normal" and will even suffer a kind of self-doubt that negatively affects his relationships with members of his own group.[9] The stigmatized individual may experience clinical symptoms such as high blood pressure[10] or increased use of narcotics and alcohol.[11] In addition, stigmatization may present itself in such social symptoms as an approach to parenting which undercuts the child's self-esteem and perpetuates an expectation of social failure.[12] All of these symptoms may result from the stigmatization that results from non-violent prejudice. Non-violent prejudice carries with it the clear message that the target and his group are of marginal value and could be subjected to even greater indignities, such as violence that is motivated by the prejudice. An even more serious presentation of these harms results when the potential for physical harm is realized in the form of the violent prejudice represented by bias crimes.[13]

The Impact of Bias Crimes on the Target Community

The impact of bias crimes reaches beyond the harm done to the immediate victim or victims of the criminal behavior. There is a more wide-spread impact on the "target community" -- that is, the community that shares the race, religion or ethnicity of the victim -- and an even broader based harm to the general society. Members of the target

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7 *See* Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 Duke Law Journal, 431, 461 (1990).

8 *See* Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," 17 Harvard Civil Rights Civil Liberties Law Review, 133, 136-137 (1982).

9 *See, e.g.*, Gordon Allport, Nature of Prejudice, 148-149 (1954); Erving Goffman, Stigma: Notes on the Management of Spoiled Identity, 7-17, 130-135 (1963); Robert M. Page, Stigma, 1 (1984); Stevenson & Stewart, "A Developmental Study of Racial Awareness in Young Children," 9 Child Development, 399 (1958).

10 *See, e.g.*, Harburg, Erfurt, Havenstein, Chape, Schull & Schork, "Socio-Ecological Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit," 35 Psychosomatic Medicine, 276, 292-294 (1973).

11 *See, e.g.*, Kenneth Clark, Dark Ghetto: Dilemmas of Social Power, 82-90 (1965).

12 *See, e.g.*, Irwin Katz, Stigma: A Social Psychological Analysis, (1981); Harry H. L. Kitano, Race Relations, 125-126 (1974); Kiev, "Psychiatric Disorders in Minority Groups," Psychology and Race, 416, 420-424 (P. Watson, ed., 1973).

13 Allport, Nature of Prejudice, 56-59 (discussing the degrees of prejudicial action from "antilocution," to discrimination, to violence).

community of a bias crime experience that crime in a manner that has no equivalent in the public response to a parallel crime. Not only does the reaction of the target community go beyond mere sympathy with the immediate bias crime victim, it exceeds empathy as well.[14] Members of the target community of a bias crime perceive that crime as if it were an attack on themselves directly and individually. Consider the burning of a cross on the lawn of an African-American family or the spray-painting of swastikas and hateful graffiti on the home of a Jewish family. Others might associate themselves with the injuries done to these families, having feelings of anger or hurt, and thus sympathize with the victims. Still others might find that these crimes triggered within them feelings similar to the sense of victimization and attack felt by these families, and thus empathize with the victims. The reactions of members of the target community, however, will transcend both empathy and sympathy. The cross-burning and the swastika-scrawling will not just call up similar feelings on the part of other Blacks and Jews respectively. Rather, members of these target communities may experience reactions of actual threat and attack from this very event. Bias crimes may spread fear and intimidation beyond the immediate victims and their friends and families to those who share only racial characteristics with the victims.[15] This additional harm of a personalized threat felt by persons other than the immediate victims of the bias crime differentiates a bias crime from a parallel crime and makes the former more harmful to society.

This sense of victimization on the part of the target community leads to yet another social harm uniquely caused by bias crimes. Not only may the target community respond to the bias crime with fear, apprehension and anger, but this response may be directed at the group with which the immediate offenders are, either rightfully or, even more troubling, wrongfully, identified. Collective guilt always raises complicated questions of blaming the group for the acts of certain individuals. But it is one thing when groups are rightfully identified with the immediate offenders, for example, the association of a bias crime offender who is a member of a skinhead organization with other members of that organization. It is quite another when groups are wrongfully identified with the immediate offenders. Consider, for example, the association of those individuals who killed Yankel Rosenbaum with the Crown Heights Black community generally, or of those who killed Yousef Hawkins with the Bensonhurst white community generally. In addition to generating the generalized concern and anger over lawlessness and the perceived ineffectuality of law enforcement that often follows a parallel crime, therefore, a single bias crime may ignite inter-community tensions that may be of high intensity and of long-standing duration.[16]

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14 *See, e.g.*, Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law, 221 (1990) (stating the importance of empathy in combating discrimination in the United States).

15 *See , e.g.*, Robert Elias, The Politics of Victimization, 116 (1986); A. Karmen, Crime Victims: An Introduction to Victimology, 262-263 (2d ed., 1990); Levin & McDevitt, Hate Crimes; Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 Michigan Law Review, 2320, 2330 (1989).

16 *See* Robert Kelly, Jess Maghan & Woodrow Tennant, "Hate Crimes: Victimizing the Stigmatized," in Bias Crime: American Law Enforcement Responses, 26 (Robert Kelly, ed., 1993). The Crown Heights Riots exemplify how the mere perception of a bias crime can lead to violence between racial groups. See, e.g., Lynne Duke, "Racial Violence Flares for 3rd Day in Brooklyn," Washington Post, Aug. 22, 1991, at A04 (describing how racial tensions from the vehicular killing of a black child led to riots in Crown Heights between African-Americans and Jews); "Crown Heights the Voices of Hate Must

The Impact of Bias Crimes on Society as a Whole

Finally, the impact of bias crimes may spread well beyond the immediate victims and the target community to the general society. This effect includes a large array of harms from the very concrete to the most abstract. On the most mundane level -- but by no means least damaging -- the isolation effects discussed above have a cumulative effect throughout a community. Consider a family, victimized by an act of bias-motivated vandalism, which then begins to withdraw from society generally; the family members seek safety from an unknown assailant who, having sought them out for identifiable reasons, might well do so again. Members of the community, even those who are sympathetic to the plight of the victim family and who have been supportive to them, may be reluctant to place themselves in harm's way and will shy away from socializing with these victims or having their children do so. The isolation of this family will not be solely their act of withdrawal; there is a societal act of isolation as well that injures both the family that is cut off and the community at large.

Bias crimes cause an even broader injury to the general community. Such crimes violate not only society's general concern for the security of its members and their property but also the shared value of equality among its citizens and racial and religious harmony in a heterogeneous society. A bias crime is therefore a profound violation of the egalitarian ideal and the anti-discrimination principle that have become fundamental not only to the American legal system but to American culture as well.[17]

This harm is, of course, highly contextual. We could imagine a society in which racial motivation for a crime would implicate no greater value in society than the values violated by a criminal act motivated solely by the perpetrator's dislike of the victim. But it is not ours, with our legal and social history. Bias crimes implicate a social history of prejudice, discrimination, and even oppression. As such, they cause a greater harm than parallel crimes to the immediate victim of the crime, the target community of the crime, and to the general society.

Motivation as an Element of the Crime

The fact that bias motivation is a key element of bias crimes has drawn criticism from some who have argued that bias crime laws impermissibly stray beyond the punishment of act and purposeful intent and go on to punish motivation. This concern was well stated by the Wisconsin Supreme Court, later overruled by the United States Supreme Court, in *Wisconsin v. Mitchell*:

> Because all of the [parallel] crimes are already punishable, all that remains is an additional punishment for the defendant's motive in selecting the victim. The

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Not Prevail," Detroit Free Press, Aug. 25, 1991, at 2F (stating that violence erupted between the African-American and Jewish community after the accidental killing of a black child by a Hasidic Jew).

17 *See , e.g.,* Delgado, *supra* note 8, at 140-141. *See generally* Paul Brest, "The Supreme Court, 1975 Term - Forward: In Defense of the Antidiscrimination Principle," 90 Harvard Law Review 1 (1976).

punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights.[18]

This holding, however, is not required by a careful analysis of the relevant doctrines. Purely as a matter of positive law, concern with the punishment of motivation is misplaced. Motive often determines punishment. In those states with capital punishment, the defendant's motivation for the homicide stands prominent among the recognized aggravating factors that may contribute to the imposition of the death sentence. For instance, the motivation of profit in murder cases is a significant aggravating factor adopted in most capital sentencing schemes.[19]

Bias motivation itself may serve as an aggravating circumstance. In *Barclay v. Florida*,[20] the Supreme Court explicitly upheld the use of racial bias as an aggravating factor in the sentencing phase of a capital case. The Court reaffirmed *Barclay* in 1992 in *Dawson v. Delaware*.[21] The prosecution in *Dawson* sought to use the defendant's membership in the Aryan Brotherhood as an aggravating circumstance. The Court rejected the prosecution argument but only because the defendant had been convicted of a same race murder, not a bias-motivated murder, and because the prosecution did not argue that the defendant's relationship with the Aryan Brotherhood indicated a propensity for future violence. In this case, therefore, the evidence was deemed irrelevant and thus inadmissible. But in reaching that holding, the Court reaffirmed the holding in *Barclay* that evidence of racial intolerance and subversive advocacy were admissible where such evidence was relevant to the issues involved in sentencing. [22] Moreover, several federal civil rights crimes statutes explicitly make racial motivation an element of criminal liability.[23]

Finally, racial motivation is the *sine qua non* for a vast set of civil anti-discrimination laws governing discrimination in employment[24] and housing[25] among

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18 State v. Mitchell, 485 N. W. 2d 807, 812 (Wis. 1992), *rev'd*, 508 U.S. 476 (1993). *See* State v. Wyant, , 597 N. E. 2d 450 (Ohio 1992), *vacated* 508 U.S. 969 (1993).

19 *See, e.g.*, Model Penal Code § 210.6(3)(g) (Official Draft 1985) (among aggravating circumstances to be considered is whether the "murder was committed for pecuniary gain"); Conn. Gen. Stat. Ann. § 53a-46a (West 2001); Del. Code Ann. Tit. 11, §4209 (2001); N.H. Rev. Stat. Ann. § 630:5 (1996).

20 Barclay v. Florida, 463 U.S. 939, 940 (1983) ("U. S. Constitution does not prohibit a trial judge from taking into account the elements of racial hatred," provided it is relevant to the aggravating factors).

21 Dawson v. Delaware, 503 U.S. 159 (1992).

22 *Id.*, 163.

23 *See* 18 U.S.C. §245(b)(2) (2000) (proscribing force or intimidation against a victim because of the victim's race and because the victim is engaged in one of certain enumerated activities); 18 U.S.C. §242 (2000) (proscribing, inter alia, disparate punishment of persons based on race or national origin); 42 U.S.C. §3631 (2000) (proscribing racially-motivated interference with right of access to housing by intimidation and the threat of force). See also Church Arson Prevention Act of 1996, Pub. L. No. 104-555, 110 Stat. 1392, amending 18 U.S.C. §247.

24 *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§2000e (2000)). *See also* Wards Cove Packing Co. v. Atonio, 490 U. S. 642

others. In most states, for example, unless an employment contract or collective bargaining agreement provides otherwise, an employer may fire an employee for any reason at all or for no reason whatsoever. Under Federal (and often State) civil rights laws, however, this same firing becomes illegal if it is motivated by the employee's race or a number of other protected characteristics. Thus, the only way to determine whether such a firing is legal or not is to inquire at some level into the motivation of the employer. If bias crime laws unconstitutionally punish motivation as a matter of First Amendment doctrine, then this argument should apply with equal weight to those statutory schemes that authorize civil damage awards for otherwise permissible actions such as discharging an at-will employee. No one has seriously challenged civil anti-discrimination laws on this basis nor would any court uphold such a challenge. Bias crime laws do not raise a different issue in any relevant manner.

The second flaw with the argument that motive may not be a basis for punishment is somewhat more abstract. The argument against the punishment of motive is necessarily premised on the assertion that motive can be distinguished from *mens rea*, that is, that motive can be distinguished from intent. Plainly, an actor's intent is a permissible basis for punishment. Indeed, intent serves as the organizing mechanism of modern theories of criminal punishment. Specifically, intent concerns the mental state provided in the definition of an offense in order for assessing the actor's culpability with respect to the elements of the offense.[26] Motive, on the other hand, concerns the cause that drives the actor to commit the offense.[27] On this formal level, motive and intent may be distinguished.

The distinction between intent and motive does not hold the weight that some would place upon it because the decision as to what constitutes motive and what constitutes intent depends on what is being criminalized. Criminal statutes define the elements of the crime and a mental state applies to each element. The mental state that applies to an element of the crime we will call "intent" whereas any mental states that are extrinsic to the elements we will call "motivation." The formal distinction, therefore, turns entirely on what are considered to be the elements of the crime. What is a matter of intent in one context may be a matter of motive in another. Consider the bias crime of a racially-motivated assault upon an African-American. There are two equally accurate descriptions of this crime, that is, two different ways in which a state might define the elements of this bias crime: one describes the bias as a matter of *intent*; the other, as a separate matter of *motive*. The perpetrator of this crime could be seen as either:

(i) possessing a *mens rea* of purpose with respect to the assault along with a *motivation* of racial bias; or

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(1989); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (disparate treatment claims require showing of intentional discrimination by the defendant).

25 *See* Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 83 (codified as amended at 42 U.S.C. §3601 (2000)).

26 Joshua Dressler, Understanding Criminal Law 96-97 (1987). *See also* Model Penal Code §2.02(2)(a)(i) (Official Draft 1985) (defining the mental state of "purpose" as a person's conscious object to engage in certain conduct or cause a certain result).

27 *See* Wayne R. LaFave & Austin W. Scott, Criminal Law §3.6, 227-228 (2d ed., 1986).

(ii) possessing a first-tier *mens rea* of purpose with respect to the parallel crime of assault and a second-tier *mens rea* of purpose with respect to assaulting *this* victim because of his race.

Either description accurately states that which a bias crime law could criminalize. The defendant in description (i) "intends" to assault his victim and does so *because* the defendant is a racist. The defendant in description (ii) "intends" to assault an African American and does so with both an intent to assault and a discriminatory or animus-driven intent as to the selection of the victim.

Because both descriptions are accurate, the formal distinction between intent and motive fails. Whether bias crime laws punish motivation or intent is not inherent in those prohibitions. Rather the distinction simply mirrors the way in which we choose to describe them. In punishing bias-motivated violence, therefore, the Hate Crimes Prevention Act raises neither pragmatic nor doctrinal problems concerning a punishment of motivation. Properly understood, bias crime laws punish motivation no more than do criminal proscriptions generally.

II. Should Gender, Sexual Orientation, Gender Identity and Disability be Included in a Federal Criminal Civil Rights Statute?

A bias crime is a crime committed as an act of prejudice. Prejudice, in this context, is not strictly a personal predilection of the perpetrator. A prejudiced person usually exhibits antipathy towards members of a group based on false stereotypical views of that group. But in order for this to be the kind of prejudice of which we speak here, this antipathy must exist in a social context, that is, it must be an animus that is shared by others in the culture and that is a recognizable social pathology within the culture.

Gender, sexual orientation, gender identity and disability ought to be included in a federal bias crime law as they are in the Hate Crimes Prevention Act. The violence involved in each case arises from a social context of animus. Opponents to including gender generally do not argue that women as a class are unsuitable for bias crime protection. Sex is generally an immutable characteristic, and no one seriously argues that women are not victimized as a result of their gender. Instead, opponents argue that crimes against women are not *real* bias crimes, that is, that they do not fit the bias crime model. The argument against including sexual orientation and gender identity instead looks to the qualities of the characteristic itself. Some opponents, either because they view sexual orientation and gender identity as a choice and not as an immutable characteristic, or because they are wary of giving special rights to gays and lesbians, argue that homosexuals do not deserve inclusion in bias crime statutes.[28] Both sets of arguments, however, are ultimately flawed. Finally, including disability in a federal bias crime law

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28 *See, e.g.*, comments by Rep. Woody Burton of the Indiana House, arguing that gays and lesbians choose homosexuality and do not deserve protection under the state's hate crimes bill. "Gay Protection Stays in Hate Crimes Bill," Chicago Tribune, February 2, 1994 at 3; comments by Sen. John Hilgert of the Nebraska State Legislature arguing that gays and lesbians do not need protection under the state's a bias crimes bill because they are an "affluent, powerful class." "State Hate Crimes Law Urged Nebraska Legislators hear from Police, Civil Rights Officials," The Omaha World-Herald, February 14, 1997.

would be an appropriate extension of the Congressional commitment to the rights of the disabled.

Should Gender be Included in Bias Crime Laws

Those who argue that gender should not be a bias crime category assert that gender-related crimes do not fit the standard bias crime model. The chief factor in bias crimes is that the victim is attacked because he possesses the group characteristic. From this chief factor, two things follow:

(i) victims are interchangeable, so long as they share the characteristic; and
(ii) victims generally have little or no pre-existing relationship with the perpetrator that might give rise to some motive for the crime other than bias toward the group.

Those who oppose the inclusion of gender in bias crime laws argue, among other things, that victims of many gender-related crimes are not interchangeable,[29] and that victims often have a prior relationship with their attackers.[30] Because assailants are acquainted with their victims in many gender-related cases, the argument goes, the victims are not interchangeable and the crime does not fit into the bias crime category. Particularly in cases of acquaintance rape and domestic violence, the prior personal relationship between victim and assailant makes it difficult to prove that gender animus, and not some other component of the relationship, is the motivation for the crime.

Gender-motivated violence, however, should be included in bias crime statutes.[31] This is not to say that all crimes where the perpetrator is a man and the victim is a woman are bias crimes. But where the violence is motivated by gender, this is a classic bias crime. This is most obviously true in cases of stranger rape or random violence against women. The recent case of Charles Carl Roberts IV makes the point powerfully. On October 2, 2006, in Nickel Mines, Pennsylvania, Roberts finished his milk route, dropped his children off at school and drove to an Amish school. Roberts entered the school with gun in hand and calmly dismissed three women with infants and fifteen boys, barricading himself in with the ten remaining girls. Roberts then bound the girls together at the head of the classroom, called 911 and calmly told police to leave, and then shot each girl and then himself. The aftermath left five young girls and Roberts dead, with the other five girls injured. Before the assault, Roberts had left suicide notes and called his wife to let her know he was not coming home. He told his wife he had molested three and five-year old female relatives twenty years ago and was dreaming of molesting children again.

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[29] *See* Lois Copeland & Leslie R. Wolfe, Violence Against Women as Bias Motivated Hate Crime: Defining the Issues, 32 (1991); Steven Bennett Weisburd & Brian Levin, "'On the Basis of Sex': Recognizing Gender-Based Bias Crimes," 5 Stanford Law and Policy Review 21, 36 (Spring 1994).

[30] Weisburd and Levin, 5 Stanford Law and Policy Review at 38 (discussing the personal relationship dynamic and arguing that the existence of such a relationship should not preclude bias crime classification where there is also evidence of a group component, that is, evidence that victimization is due at least in part to bias against the victim's gender).

[31] Congress did include gender as a category in the legislation that enhances the penalties for federal crimes committed with bias-motivation. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60003(a)(14), 108 Stat. 1796 (1994) (codified at 42 U.S.C. § 13701 (1994)). See 42 U.S.C. §994 (hereinafter 42 U.S.C. §994).

Police said he may have targeted the school for its female students and may have intended to molest them.

Robert's crime plainly fits the model of classic bias crimes: his victims were shot solely because they were female and, from his point of view, could well have been a different group of individuals, so long as they were female. An attacker's acquaintance with his victim would not make a race or religion-based crime any less a bias crime. Motive can be difficult to prove in a gender-related crime. Nonetheless, proof of discriminatory motive is difficult for any bias crime, and this has not and should not preclude the enactment of bias crime laws.[32] Bias crimes should include only gender-*motivated* violence and not all crimes that happen to have female victims. But those crimes where gender-motivation can be proved clearly share all the characteristics of bias crimes, and should be punished as such.

Inclusion of gender in the Hate Crimes Prevention Act will not, as some fear, lead to the federalization of all cases of rape, sexual assault, and domestic violence. As will be discussed below in Part IV of this Statement, the legislation is clearly designed such that federal law enforcement will come into play only in those cases in which there is a strong federal interest and an essential federal role to be played. As suggested by the strong support that this legislation has drawn from local law enforcement groups, there is no realistic concern that the Hate Crimes Prevention Act will lead to an excessive role of federal law enforcement in what are essentially state law matters.

Sexual Orientation and Gender Identity

It is difficult to make a strong argument that crime motivated by bias, on the basis of sexual orientation -- "gay bashing" -- does not fit the bias crime model. The factors that make some gender-related crimes so problematic, existence of a personal relationship or the lack of victim interchangeability, are not present in most crimes against homosexuals on the basis of their sexual orientation. Many crimes against homosexuals share all of the characteristics of bias crimes.[33] If one of the purposes of bias crime statutes is to protect frequently victimized groups, sexual orientation is particularly worthy of inclusion. Some surveys indicate that over fifty percent of homosexuals in the United States have been the victims of attacks motivated by sexual orientation.[34] A Department of Justice report noted that "homosexuals are probably the most frequent victims of hate crimes."[35] Several legislators who have supported the

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32 Marguerite Angelari, "Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women," 2 American University Journal of Gender and Law 63, 98-99 (1994).

33 Anthony S. Winer, "Hate Crimes, Homosexuals, and the Constitution," 29 Harvard Civil Rights - Civil Liberties Law Review 387 (1994).

34 Gary D. Comstock, Violence Against Lesbians and Gay Men 36 (1991).

35 National Institute of Justice, United States Department of Justice, The Response of the Criminal Justice System to Bias Crime: An Exploratory Review (1987). *See also* FBI 2005 Hate Crimes Statistics Act report: http://www.fbi.gov/ucr/hc2005/index.htm (reporting 1,017 crimes directed at gays and lesbians -- 14.2% of all crimes -- making them the third most frequent victims of hate violence, behind race and religion).

addition of sexual orientation to state and local bias crime laws did so at least partly in response to an increase, or at least an increase in reported bias-motivated crimes against homosexuals.[36]

The debate over the inclusion of sexual orientation in bias crime laws has turned primarily on a different factor: whether homosexuality as a category deserves bias crime protection. At times, this argument has been couched in terms of whether homosexuality is an immutable characteristic in the way that race, color, ethnicity, or national origin are.

The argument for exclusion of sexual orientation from bias crime laws because of the non-immutability of homosexuality is weak for two sets of reasons. First, there is much evidence that sexual orientation is indeed immutable, whether for genetic reasons alone, or some combination of genetic and environmental reasons.[37] Even if this evidence is not conclusive, there is certainly no scientific basis to conclude that sexual orientation is a matter of personal choice.

Second, immutability turns out to be a multi-layered concept. Even if we were to assume that homosexuality is indeed chosen behavior, sexual orientation would be appropriate for a bias crime law. After all, this same argument could be made with respect to religion, one of the classic bias crime characteristics. The choice not to remain Jewish or Catholic is certainly more real than the choice not to remain Black. The reason that religion, along with race, color, ethnicity, and national origin, is protected by virtually all bias crime statutes, is that we deem it unreasonable to suggest that a Jew or Catholic might just choose to avoid discrimination by giving up her religion. Indeed, we deem it outrageous. Understood in this light, the question of immutability collapses into a basic value-driven question: are homosexuals somehow deserving of less protection than other groups? The Supreme Court has already answered this question in *Romer v. Evans*,[38] In *Romer*, the Court struck down Colorado's "Amendment 2," a state constitutional amendment that prohibited any governmental action designed to protect the civil rights of homosexuals. An explicit denial of rights to gays and lesbians is irrational and thus unconstitutional.

The inclusion of sexual orientation and gender identity in the Hate Crimes Prevention Act fills an important gap in federal bias crime law enforcement. First, although in 1994, Congress directed the United States Sentencing Commission to enhance penalties for federal crimes committed with bias, including sexual orientation,[39] this provision is limited to those acts of violence that are already federal crimes. Thus its reach is quite limited, failing to cover, for example, assault and vandalism, the two most common forms of bias crimes. Second, 18 U.S.C. §245 does not cover bias crimes based

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36 *See* "Hate Crimes May Affect Legislation," Charleston Daily Mail, Mar. 13, 1997; "Panel Hears Harassment Bill Testimony," Portland Oregonian, Feb. 10, 1993 at D8; Jo-Ann Armao, "Hate-Crime Bill Voted To Aid Gays," The Washington Post, Sept. 20, 1989 at B1; "Lawyers Tell Legislators: Strengthen, Broaden 'Hate Crimes' Law," AIDS Weekly, May 5, 1992.

37 *See* John Travis, "X Chromosome Again Linked to Homosexuality," Science News, Nov. 4, 1995 at 295; Eliot Marshall, "NIH's 'Gay Gene' Study Questioned," Science, June 30, 1995 at 1841.

38 Romer v. Evans, 517 U.S. 620 (1996)

39 *See* Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §994.

on sexual orientation unless there is some independent basis for federal jurisdiction, such as racial bias. Finally, gender identity, although plausibly covered by the inclusion of gender and sexual orientation, is not clearly covered. Instances of bias motivated violence based on the actual or perceived gender identity of the victim represents another assault on the right to be different and to exist safely in a diverse society such as ours.

Disability

Congressional commitment to the rights of disabled Americans is best exemplified by the landmark Americans with Disabilities Act of 1990. This commitment has already been extended into the area of bias-motivated violence directed at the disabled by the inclusion of disability in the Hate Crimes Statistics Act in 1994 and the Violent Crime Control and Law Enforcement Act of 1994, However, disability-driven violence is not covered by 18 U.S.C §245 such that today federal law enforcement has authority neither to investigate nor prosecute, nor even help in the investigation or prosecution of such crimes. By including disability as a category, the Hate Crime Prevention Act at long last fills this significant gap in the law.

III. Bias Crime Laws and the Right to Free Expression

Bias crime laws have caused us to focus more on the relationship between First Amendment rights and civil rights than at any time since Nazis threatened to march in Skokie, Illinois in the late 1970s.[40] To be sure there is a tension here. On the one hand, we have crimes that are worse exactly because of their bias motivation. On the other hand, we have a fundamental constitutional principle: the right to free expression of ideas, even if distasteful or hateful. The right to free expression, based in the First Amendment to the Constitution, lies at the heart of our legal culture.

I believe that the purported conflict between the punishment of bias crimes and the protection of free expression is an *apparent* conflict because the so-called paradox of seeking to punish the perpetrators of bias motivated violence while being committed to protecting the bigot's rights to express racism is a false paradox. We can in fact do both and the Hate Crime Prevention Act is consistent with the First Amendment precisely because it does do both.

Bias Crime Laws are Consonant with the First Amendment and Principles of Free Expression

Well over a decade ago, the Supreme Court in *Wisconsin v. Mitchell*[41] held that bias crime laws are constitutional. The Hate Crime Prevention Act thus breaks no new ground where the First Amendment is concerned and, as will be discussed shortly, to the

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40 *See generally* Donald A. Downs, Nazis in Skokie: Freedom, Community, and the First Amendment (1985); James L. Gibson & Richard D. Bingham, Civil Liberties & Nazis: The Skokie Free Speech Controversy (1985); David Hamlin, The Nazi Skokie Conflict: A Civil Liberties Battle (1982).

41 Wisconsin v. Mitchell, 508 U.S. 476 (1993).

extent it does, it provides *greater* protection for the right of free expression that hate crime laws such as that upheld in the *Mitchell* case.

In *Wisconsin v. Mitchell*, the Supreme Court considered the Constitutionality of the Wisconsin bias crime statute. The statute provided for penalty enhancement for crimes of violence in which the defendant "intentionally selects the person against whom the crime [is committed] because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person." The defendant in the case was Todd *Mitchell*, a nineteen-year old Black man, convicted of aggravated battery for his role in the severe beating of Gregory Riddick a fourteen-year old white male. Under Wisconsin law, this crime carries a maximum sentence of two years.[42] Wisconsin's penalty enhancement law, however, provided that the possible maximum penalty for a bias motivated aggravated battery is seven years.[43] In addition to his conviction for battery, Mitchell was found to have acted out of racial bias in the selection of the victim. Facing a possible seven-year sentence, he was sentenced to four years incarceration.[44]

The defendant challenged his sentence on the grounds that the bias crime statute amounted to punishment of his thoughts. The Supreme Court unanimously rejected this argument and upheld both the sentence and the statute, noting that "[t]raditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant," The Court held that the statute was directed at a defendant's conduct -- committing the crime of assault – and not his thoughts. The Court then held that, because the bias motivation would have to have a close nexus with a specific criminal act, there was little risk that the

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[42] Wis. Stat. Ann. §§939.05, 939.50(3)(e), 940.19 (1m) (West 2005) (sentence for complicity in aggravated battery is two years).

[43] Wis. Stat. Ann. §939.645 (West 2005) provides:

(1) If a person does all of the following, the penalties for the underlying crimes are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b)If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.

(c)If the crime committed under sub. (1) is ordinarily a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum term of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4)This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin, or ancestry is required for a conviction for that crime.

[44] Mitchell, 485 N.W. 2d at 807.

statute would chill protected bigoted speech. The statute focused not on the defendant's bigoted ideas, but rather on his actions based upon those ideas. Finally, the Court made clear that "the First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."

The Supreme Court considered and rejected a similar challenge to a law aimed at bias-motivated violence based on its alleged interference with free expression when it upheld a conviction under Virginia's cross-burning statute in *Virginia v. Black.*[45] The cross-burning statute provided in pertinent part as follows:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.[46]

Virginia v. Black arose out of two separate cases involving three defendants. Like textbook examples, the two cases represent the two poles of cross burnings – criminal domestic terrorism and constitutionally protected expression of White supremacy. Barry Black led a Ku Klux Klan rally on private property, at the conclusion of which a twenty-five to thirty-foot cross was burned. At his trial, the jury was instructed that they were required to find an "intent to intimidate" and that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent."[47] The cross burning for which Richard Elliott and Jonathan O'Mara were prosecuted was quite different. They attempted to burn a cross on the lawn of an African-American, James Jubilee, who had recently moved next door, to "get back" at Jubilee.[48] At the trial, the jury was instructed that they could infer the requisite intent for the crime of cross burning from the act of burning the cross itself. The judge went on to instruct the jury that the Commonwealth was required to prove, among other things, that "the defendant had the intent of intimidating any person or group of persons."[49]

All three defendants appealed to the Supreme Court of Virginia. That court struck down the cross-burning statute, relying heavily on *R.A.V. v. City of St. Paul*[50], the 1992 case in which the Court struck down a cross-burning ordinance as a content-related proscription in violation of the First Amendment.[51] The United States Supreme Court granted certiorari on two related issues: whether the cross-burning statute violated the First Amendment as interpreted in *R.A.V.* (the *R.A.V.* issue), and whether the statutory

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[45] Virginia v. Black, 538 U.S. 343 (2003).

[46] Va. Code. Ann. §18.2-423 (2004) (enacted in 1950). The prima facie provision was added to the statute in 1968.

[47] Black, 538 U.S. at 349.

[48] Id. at 350.

[49] Id.

[50] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[51] Black v. Commonwealth, 553 S.E. 2d 738 (2001), aff'd in part and vacated in part, 538 U.S. 343 (2003).

presumption that cross burning itself is "prima facie evidence" of the defendant's intent to intimate was unconstitutionally overbroad (the overbreadth issue). In an opinion by Justice O'Connor, the majority of the Court upheld the statute on the *R.A.V.* issue. Although there was no majority opinion on the overbreadth issue, a majority of the Court was of the view that the statutory presumption was constitutionally invalid.[52]

A blueprint for a constitutional cross-burning statute emerges from a consideration of the Court's treatment of the two issues. The *R.A.V.* issue concerned the holding in that case that the St. Paul cross-burning ordinance was an unconstitutional content-based prohibition, proscribing only that conduct that will cause "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" and not on any other basis. The Court in *Black* upheld the Virginia statute as a law aimed at *all* cross burnings that are intended to intimidate, regardless of the race or ethnicity of the victim.[53] The overbreadth issue concerned the "prima facie evidence" clause of the cross-burning statute. Intimidation would have to be proved, not presumed, unless is an easily rebuttable presumption.[54] The decision in *Black* thus represents a significant refinement to the holding in *R.A.V.*, and one that is ultimately supportive of a view that bias crime laws are consistent with concerns of free expression, both constitutional and philosophical.

The balance between protecting speech and enforcing bias crimes may be illustrated by considering the specific facts at issue in *Black*. Wholly consistent with the values of free expression, Virginia might punish Richard Elliott and Jonathan O'Mara, and these same values preclude Virginia from punishing Barry Black. Moreover, Virginia could prosecute Elliott and O'Mara for a bias-motivated crime of cross burning. Virginia could punish Elliot and O'Mara not only for intending to terrorize Jubilee but also for doing so with a further intent ("motivation" if you like) to terrorize Jubilee because of his race and to cause fear and harm to other African-Americans.[55] They would receive an enhanced punishment for committing a crime with a heightened level of intent, one that is intended to cause a great and more pervasive level of harm.

The Hate Crimes Prevention Act is Consonant with the First Amendment

Under the Supreme Court's jurisprudence established in *Wisconsin v. Mitchell* and *Virginia v. Black*, bias crime statutes generally are constitutional. In it noteworthy that the Hate Crimes Prevention Act provides even great protection for the rights of free expression that was present in the statutes upheld in *Mitchell* and *Black*.

Under Section 7 of the proposed legislation, §249(d) shall provide as follows:

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52 See Black, 538 U.S. at 364-67 (O'Connor, J., plurality); 538 U.S. at 384-87 (Souter, J., concurring in judgment and dissenting in part).

53 Id. at 362-63.

54 Id. at 366 (O'Connor, J.); Id. at 385 (Souter, J.); Id. at 368-71 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).

55 See Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law, 106-109 (1999).

> Rule of Evidence – In a prosecution for the offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically related to that offense. However nothing in this section affects the rules of evidence governing impeachment of a witness.

It does not appear that such a rule excluding evidence of expression is required by the First Amendment under the *Mitchell* holding. But the protections provided by Section 7 of the Hate Crimes Prevention Act further address any concerns that this law will infringe on rights of free expression or free thought. The Hate Crime Prevention Act, as is true of bias crime laws adopted by states throughout the country, is aimed at criminal acts, not expression or thoughts.

The second, and somewhat more complex, way of considering this question, allows us to situate this discussion in a broader context of the "fighting words" doctrine and again, permits a criminal law that reaches bias-motivated violence without reaching protected aspects of hate speech.

IV. The Federal Role and the State Role in the Punishment of Bias Crimes

Because bias crimes are distinguished from ordinary state law crimes solely by the actor's bias motivation toward the victim, we confront three sets of questions concerning a *federal* bias crime law such as the Hate Crimes Prevention Act.

> (i) the constitutional question -- is there a constitutional basis for federal criminal jurisdiction over bias crimes?
> (ii) the prudential question -- assuming a constitutional basis for federal criminal jurisdiction over bias crimes, is there a sufficient federal interest here to warrant such legislation?
> (iii) the pragmatic question -- assuming both a constitutional basis and prudential need for federal bias crime laws, how ought federal and state jurisdiction over these crimes work together?

The constitutional question -- is there a constitutional basis for federal criminal jurisdiction over bias crimes?

In my opinion, Congressional authority to enact the Hate Crimes Prevention Act is found in the Thirteenth Amendment and in the Commerce Clause of the Constitution.

The Thirteenth Amendment states that "[n]either slavery nor involuntary servitude . . . shall exist within the United States" and further provides Congress with the

power to enforce the amendment "by appropriate legislation."[56] Nineteenth and early Twentieth Century judicial interpretation of the amendment interpreted its scope and purpose narrowly, viewing it as a formal statement of emancipation which was largely already accomplished. For example, in *Hodges v. United States*, the Court dismissed an indictment that had charged a group of white defendants with conspiring to deprive Black workers of the right to make contracts, because the violation of the right to make a contract was not an incident of slavery.[57] The modern view of the Thirteenth Amendment is much broader. In a series of cases, the Supreme Court has articulated a theory of the Thirteenth Amendment as a source of broad proscription of all the "badges and incidents" of slavery. Moreover, this proscription applied to the conduct of private individuals, not just to state actions.

The path-breaking case was *Jones v. Alfred Mayer Co.*[58] in which the Court held that private racial discrimination in the sale of property violated section 1982, a First Reconstruction civil statute that guarantees to all citizens the "same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property."[59] In this regard, *Jones* expressly overruled *Hodges*. Several years later, in *Runyon v. McCrary*,[60] the Court similarly held that section 1981, a statute of the same period providing all persons with "the same right . . . to make and enforce contracts. . . as is enjoyed by white citizens. . . "[61] prohibited private racial discrimination in any contractual arrangements. *Runyon* itself involved discrimination in education. In *Jones* and *Runyon*, the Court held that the Thirteenth Amendment provided the constitutional authority for the regulation of private discriminatory conduct. Just as the first section of the Amendment had abolished slavery and all "badges and incidents" of slavery, so the second section empowered Congress to make any rational determination as to that conduct which constitutes a badge or incident of slavery and to ban, whether from public or private sources.

The abolition of slavery in the Thirteenth Amendment, although clearly grounded in the enslavement of African-Americans has always been understood to apply beyond the context of race. As early as the *Slaughter House Cases*, Justice Miller saw the Thirteenth Amendment as a prohibition not only against slavery of Black citizens but "Mexican peonage" and "Chinese coolie labor systems" as well.[62] Modern cases have extended the protection of the amendment to religious and ethnic groups as well.[63]

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56 U.S. Const. amend. XIII, §1, 2.

57 Hodges v. United States, 203 U.S. 1 (1906). See also discussion in Part B of Chapter 5 of the Thirteenth Amendment and the judicial interpretation of the Amendment in *Slaughter House Cases* and *Civil Right Cases*.

58 Jones v. Alfred H. Mayer Co., 392 U. S. 409 (1968).

59 42 U.S.C. §1982 (2000).

60 Runyon v. McCrary, 427 U. S. 160 (1976).

61 42 U.S.C. §1981 (2000).

62 Slaughter-House Cases, 83 U.S. 36, 72 (1873).

63 St. Francis College v. Al-Khazraji, 481 U. S. 604 (1987); Shaare Tefila Congregation v. Cobb, 481 U. S. 615 (1987).

As a matter of constitutional authority, Congress may enact a federal bias crime law so long as it is rational to determine that racially-motivated violence is as much a "badge" or "incident" of slavery as is discrimination in contractual or property matters. This determination is surely rational. Racially-motivated violence, from the First Reconstruction on, was in large part a means of maintaining the subjugation of Blacks that had existed under slavery. Violence was an integral part of the institution of slavery, and post-Thirteenth Amendment racial violence was designed to continue *de facto* what was constitutionally no longer permitted *de jure*.

The broad reach of the Thirteenth Amendment as understood today goes beyond a prohibition of re-enslavement of those who have been previously enslaved. By protecting ethnic, religious and national origin and other groups whose victimization is based on their gender, sexual orientation, gender identity or disability, the Thirteenth Amendment is more consonant with a positive guarantee of freedom and equal participation in civil society.[64] Violence, directed against an individual out of motive of group bias, violates this concept of freedom.

Perhaps out of concern that the Thirteenth Amendment may provide a surer constitutional footing for bias crimes based on race or ethnicity than against members of other groups, the proposed legislation seeks to ground bias crimes based on religion, gender, sexual orientation, gender identity and disability in the Commerce Clause. I agree that the Commerce Clause provides additional constitutional support for inclusion of these bias crimes in a Federal statute. Bias crimes affect the decisions of target group members as to where they might work and where they might live. Indeed, bias crimes are often directed at forcing their victims to leave the area where they have settled. The impact of bias crimes on the national economy thus brings the punishment of these crimes within the Commerce Clause power. Even as restricted by the decision in *United States v. Lopez*, in which the Supreme Court struck down the Federal Gun-Free Zones Act,[65] the Commerce Clause is broad enough to reach such activities as bias-motivated violence. *Lopez* did not overturn the well-established doctrine that upheld numerous federal criminal statutes on the basis of the Commerce Clause, such as a federal loan-shark statute without any showing of a specific interstate nexus,[66] and such federal crimes as arson,[67] disruption of a rodeo,[68], sale or receipt of stolen livestock[69], and wrongful disclosure of video tape rentals.[70] Moreover, since *Lopez*, numerous lower courts have upheld such federal criminal laws as the 1992 Federal Carjacking Act, the Child Support Act of 1992, the Freedom of Access to Clinic Entrances Act, and the Migratory Bird

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64 *See* Charles H. Jones, Jr. "An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. §241 and the Thirteenth Amendment," 21 Harvard Civil Rights - Civil Liberties Law Review 689 (1986); Arthur Kinoy, "The Constitutional Right of Negro Freedom," 21 Rutgers Law Review 387 (1967).

65 United States v. Lopez, 514 U. S. 549 (1995).

66 Perez v. United States, 402 U.S. 146 (1971).

67 18 U.S.C. §844 (2000).

68 18 U.S.C. §43 (2000).

69 18 U.S.C. §2317 (2000).

70 18 U.S.C. §2710 (2000).

Treaty Act in the face of challenges that, under *Lopez*, these laws exceeded federal jurisdiction.[71]

Morrison v. United States,[72] in which the Supreme Court struck down a section of the Violence Against Woman Act (VAWA),[73] requires no contrary conclusion concerning the constitutional authority underpinning the Hate Crime Prevention Act. In *Morrison*, the Court, applying *Lopez*, found the civil remedy in VAWA unconstitutional because it lacked a requirement of a close connection between the specific conduct prohibited by the statute and interstate commerce. The Court emphasized, as it had in *Lopez*, a concern that the statute at issue did not include an "express jurisdictional element." The Hate Crime Prevention Act directly addresses this jurisdictional concern from *Morrison and Lopez*. Under the proposed legislation, section 249(2)(B) expressly requires an jurisdictional allegation that requires the Government to establish the nexus between interstate or foreign commerce and the bias crime at issue in order to bring a case under the Hate Crime Prevention Act. The concerns of federalism raised by the Court in *Morrison* are thus fully addressed in the proposed legislation.

The prudential question -- is there a sufficient federal interest to warrant federal bias crime legislation?

There are two sources of strong federal interest in support of such legislation. The first source arises out of the problem of state default in bias crime prosecution. State default was the prime justification for the original creation of federal criminal civil rights. During the Nineteenth and the early Twentieth Century, state governments, particularly in the south, could not be relied upon to investigate and prosecute bias crimes within their jurisdiction. Even through the middle part of this century, state default had remained a critical factor warranting a federal role in bias crimes. But for federal intervention, criminal charges would never have been brought in cases such as *Screws v. United States*,[74], *United States v. Guest*,[75] *United States v. Price*,[76] (the case arising out of the murder of three civil rights workers, Michael Schwerner, James Chaney, and Andrew Goodman).

This crudest form of state default, present for a full century after the Civil War -- of virtual or even literal state complicity in bias crimes -- is far less true today. Nonetheless, a less pernicious form of state default continues to exist in some circumstances, and calls for a federal role in these crimes. The contemporary form of state default arises more from systemic factors than from volitional wrong-doing on the part of state actors. For example, cases involving racially-motivated violence are likely to

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71 United States v. Mussari, 95 F. 3d 787, (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1567 (1997); United States v. Oliver, 60 F. 3rd 547 (9th Cir. 1995), *rev'd on other grounds sub nom.* Jones v. United States, 526 U.S. 227 (1999); Cheffer v. Reno, 55 F. 3rd 1517 (11th Cir. 1995); United States v. Bramble, 894 F. Supp. 1384 (D. Hawaii 1995), *aff'd* 103 F.3d 1475 (1996)..

72 Morrison v. United States, 529 U.S. 598 (2000).

73 42 U.S.C. §13981 (1998)

74 Screws v. United States, 325 U.S. 91 (1945).

75 United States v. Guest, 383 U. S. 745 (1966).

76 United States v. Price, 383 U. S. 787 (1966).

be ones of great local notoriety and to be politically charged. In most states, these cases would have to be prosecuted by an elected District Attorney and decided by a jury from the county in which the event took place. Federal prosecutions would be brought by an appointed United States Attorney who, although not necessarily altogether isolated from the political process, is nonetheless largely immune from politics. It is highly unusual for United States Attorneys to serve more than a single four-year appointed term whereas local District Attorneys are never more than four years (and often less) from the next election. Moreover, federal juries are drawn from federal judicial districts that encompass a far broader cross-section of the population than the community in which a racially-charged event took place.

Consider, for example, the tragic events that occurred in Chattanooga, Tennessee in April, 1980. A group of Ku Klux Klansman fired on five elderly Black women after a cross-burning. State criminal charges were brought against three defendants. Two of these defendants were acquitted. The one who was convicted received only a twenty-month sentence, and was paroled after four months. A federal jury, however, in a civil action, awarded the victims $535,000.[77] It is arguable, therefore, that a federal criminal jury might well have returned a guilty verdict had the defendants been charged with a federal bias crime.[78]

The second source of federal interest to support federal bias crime legislation applies even in the absence of state default. Although parallel crimes are generally state law crimes, bias crimes are not, or at least not exclusively state law crimes. Racial motivation implicates the commitment to equality that is one of the highest values of our national social contract. Bias crimes affect not only the immediate individual victims and the target victim community but the general community as well. Racial equality was at the center of the Civil War and the constitutional amendments that marked the end of that war and permitted the reintegration of the southern states. Needless to say, equality has not always been observed in deed in the United States and not all would agree on what exactly "the equality ideal" means. But none can deny that the commitment to equality is a core American principal. Bias crimes thus violate the national social contract, and not only that of the local or state community. Even if there were no issue of state default whatsoever, there is a firm prudential basis for a federal role in the investigation and prosecution of bias crimes.

A final aspect of the prudential question concerning a federal bias crime law concerns the need for new legislation. Existing federal criminal civil rights legislation is inadequate to address bias crimes fully. The federal sentencing enhancement legislation applies only to federal crimes that are committed with bias-motivation. Because the parallel crime must be a federal crime itself, this law misses the most common bias crimes which have as their parallel crimes the state law offenses of assault or vandalism.

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[77] Increasing Violence Against Minorities: Hearing Before the Subcommittee on Crime of the Committee on the Judiciary, 96th Congress, 2nd Session (1980), 26; Seltzer, "Survey Finds Extensive Klan Sympathy," Poverty Law Reporter, May/June 1982, at 7.

[78] See Geoffrey Padgett, Comment, "Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies," 75 Journal of Criminal Law and Criminology 103, 114-118 (1984)

Nor is this problem appreciably solved by section 245. In order to obtain a conviction under section 245(b)(2), the prosecution must prove two elements. The first element requires that the perpetrator committed the act with bias motivation. The second requires either that the perpetrator intended to interfere with certain of the victim's state rights, for example, use of public highways or public accommodations such as a restaurant or a hotel. This second element is too often an insurmountable burden that precludes federal involvement in the prosecution of a serious bias crime. Two cases make the point well.

In California, federal prosecutors decided not to prosecute a racist skinhead gang under section 245, even though evidence pointed to a conspiracy to bomb a Black church and assassinate some of its members. Instead, the gang members were prosecuted under weapons and explosive charges. The United States Attorney, Mark R. Greenberg, explained that "charging a civil rights violation would have made a very difficult case . . . because of the requirement that a specific 'protected right' be the purpose of the planned attacks."[79]

In the Crown Heights section of Brooklyn, New York, calls for federal action intensified after a Brooklyn jury acquitted Lemrick Nelson of murdering Yankel Rosenbaum, a Hasidic scholar who was stabbed during the Crown Heights rioting in August 1991. United States Attorney General Janet Reno expressed reluctance even to commence a grand jury investigation of the incident because of a lack of evidence. In particular, Reno stated that federal civil rights laws make it more difficult to successfully prosecute the case than state law.[80] Not only would federal prosecutors need to prove that Nelson committed the crime and that he did so out of religious motivation, but they would also need to show that the victim was chosen because of his use of public facilities. This last element would be extremely difficult to prove. Indeed, in all likelihood it simply was not true. Despite these evidentiary problems, the Federal government in August of 1994, indicted Nelson on federal charges that he violated Yankel Rosenbaum's civil rights. Two years later, the government obtained the indictment of Charles Price on similar charges.[81] The Hate Crimes Prevention Act would have permitted the cases against Nelson and Paster to go forward on issues of religious motivation. Although both men were convicted, these cases were cluttered with the issue of the use of public facilities. The need for federal intervention in this case and the federal interest in the killing would have been the same had Rosenbaum been killed with religious motivation in a private building, well off of a public street. But for the seemingly unimportant fact that this bias-motivated murder took place in a street, under current federal law there would have been no convictions in the Crown Heights case.

Former Deputy Attorney General Eric Holder summarized the case for the federal role in bias crime enforcement in a compelling way:

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79 Brian Levin, "A Matter of National Concern: The Federal Law's Failure to Protect Individuals from Discriminatory Violence," 3 Journal of Intergroup Relations 4 (1994).

80 "Reno's Doubt on Heights Persists," Newsday, Jan. 27, 1994, at 28.

81 Jim Carnes, Us and Them: A History of Intolerance in America, 127 (1995); New York Times, Aug. 22, 1996, at B1.

> Federal prosecutors have been precluded from prosecuting many incidents of brutal, hate-motivated violence because of the current statutory requirement that a defendant be proved to have acted not only because of the victim's race, color, religion, or national origin, but also because of the victim's participation in one of the six federally protected activities enumerated in the statute. This statutory requirement also has led to acquittals in several prominent federal prosecutions.[82]

The Hate Crimes Protection Act will address these limitations on current law in a manner that is consistent with the proper allocation of authority between federal and state law enforcement.

The pragmatic question -- how ought federal and state jurisdiction over bias crimes work together?

The best starting point for considering how concurrent federal and state jurisdiction over bias crimes would proceed is to look to the way in which concurrent federal and state jurisdiction over other civil rights crimes, specifically police brutality, has proceeded. Federal law enforcement has adopted a deferential posture toward state enforcement of civil rights crimes. According to Department of Justice policy, once state or local charges have been filed, federal civil rights investigations are suspended. Although the FBI may conduct an investigation of a civil rights crime at the same time as local authorities, the end-point of this investigation must still be a referral to the Department of Justice, which will defer to any local charges.[83]

The limited federal role is driven by prudential, not constitutional factors. As a matter of constitutional law, not only does the federal government have the authority to conduct concurrent investigations to state proceedings, federal prosecutors may proceed even after a full-blown state investigation, trial, and acquittal. This is the scenario that took place in the Rodney King beating case. Ordinarily, dual prosecutions that arise out of the same set of events are barred by the constitution's double jeopardy clause.[84] There is an exception, however, to acts that violate both federal and state law. Such an act is deemed to violate the law of two sovereigns and, under the "dual sovereignty doctrine," is two separate offenses for double jeopardy purposes.[85] The dual sovereignty doctrine has been severely criticized over the years and indeed, it is not easy to defend a doctrine that allows a defendant to be tried twice for what is in reality the same crime.[86]

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82 See Statement of Deputy Attorney General Eric H. Holder, Jr. before the Senate Judiciary Committee, July 8, 1998: http://judiciary.senate.gov/oldsite/erichold.htm.

83 Laurie L. Levenson, "The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial," 41 UCLA Law Review 539-540 (1994); United States Attorney's Manual, 8-3.340 (vol. 8, July 1, 1992); Ronald Kessler, The FBI 209 (1993).

84 U.S. Const. amend. V. The double jeopardy clause state: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life, or limb."

85 Heath v. Alabama, 474 U. S. 82 (1985); Bartkus v. Illinois, 359 U. S. 121 (1959); United States v. Lanza, 260 U. S. 377 (1922).

86 See, e. g., Walter T. Fisher, "Double Jeopardy, Two Sovereignties and the Intruding Constitution," 28 University of Chicago Law Review 591 (1961); Lawrence Newman, "Double Jeopardy

There is not space here for a full examination of the merits of the dual sovereignty doctrine; this has been done well elsewhere.[87] Moreover, that is not my purpose. The goal here is, working within existing constitutional doctrine, to devise the best means of facilitating the enforcement of bias crime laws with overlapping federal and state authority. I should note, however, that even though there is federal constitutional *authority* to engage in dual prosecutions, as a matter of *practice* these are very rare. Pursuant to an internal policy known as the "Petite Policy," after a case of the same name, the Department of Justice had adopted its own version of a double jeopardy bar to federal prosecutions following state trials for the same criminal acts, whether those trials resulted in conviction or acquittal. The Petite Policy restricts federal prosecution following a state trial to instances in which compelling reasons exist to prosecute, such as cases in which there remain "substantial federal interests demonstrably unvindicated" by the state procedures.[88] The Rodney King case, where such compelling reasons were deemed to exist, is thus the exceptional case that proves the rule.[89] Interestingly, in the appeal of Stacey Koon's federal sentence for his role in beating King, the Supreme Court ruled that the trial judge had not abused his discretion in making a downward departure from the federal sentencing guidelines because of the burden of successive prosecutions.[90]

The Petite Policy uses some of the right reasons to draw the wrong conclusions. Dual prosecutions are surely to be avoided whenever possible and not only due to concern for the defendant but also because of resulting problems for the prosecution. Assume that the state court prosecution ended in an acquittal. Were there a conviction, the argument for a subsequent federal trial would be weak indeed. The testimony of any witness at the state trial would be available for use by the defendant in its cross-examination of that witness if called by the prosecution in the federal trial. Problems in the state case cannot go away merely by trying again. Moreover, there is the risk that federal prosecutors in a subsequent action may be seen, even by a federal jury, as

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and the Problem of Successive Prosecutions," 34 Southern California Law Review 252 (1961); Harlan R. Harrison, "Federalism and Double Jeopardy: A Study in the Frustration of Human Rights," 17 University of Miami Law Review 306 (1963); Dominic T. Holzhaus, "Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine," 86 Columbia Law Review 1697 (1986); Susan Herman, "Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the A.C.L.U.," 41 UCLA Law Review 609 (1994).

87 There are, roughly speaking, three positions on the Dual Sovereignty doctrine: (i) opposition to the doctrine in all cases because it violates the defendant's constitutional rights; (ii) support of the doctrine as a recognition of the duality of governmental power in a federal system; and (iii) opposition to the doctrine in most cases, but supporting the doctrine in certain exceptional cases, particularly the enforcement of criminal civil rights laws, as was at issue in the Rodney King case. *See* Herman, "Double Jeopardy All Over Again;" Paul Hoffman, "Double Jeopardy Wars: The Case for a Civil Rights 'Exception,'" 41 UCLA Law Review 649 (1994); and Paul G. Cassell, "The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine," 41 UCLA Law Review 693 (1994).

88 Executive Office for United States Attorneys, United States Department of Justice, United States Attorney's Manual, 21-25 (Vol. 9, 1985).

89 *See* United States Commission on Civil Rights, Who is Guarding the Guardians? 112, 116 (1981); United States v. Davis, 906 F. 2d 829, 832 (2nd Cir. 1990).

90 Koon v. United States, 518 U.S. 81 (1996).

officious intermeddlers and outsiders. In the federal Rodney King trial, the trial judge agreed with a prosecution request that defense counsel would not be permitted to refer to Department of Justice lawyers as "Washington lawyers" during the trail, and issued the following startling ruling: "There will be no reference to 'lawyers from Washington,' . . . That's a stigma that cannot be tolerated."[91]

The Petite Policy is thus correct to try to avoid dual prosecutions as often as possible. It is wrong, however, to assume that the single prosecution that is brought must be a state court prosecution. If, as I have proposed, there were concurrent federal and state criminal jurisdiction over racially-motivated crimes, then bias crimes would join numerous others instances of concurrent criminal jurisdiction -- narcotics and organized crime just to mention two. In these areas there is no notion of federal deference to state law enforcement. Indeed, in many instances the presumption is exactly to the contrary. For our purposes, however, the better analogy is to those areas in which federal and state law enforcement work together, particularly at the investigatory stage, and then, when it comes time to determine what criminal charges are to be brought, the merits of each is weighed. At its best, this process produces a careful evaluation of whether relevant federal or state law is the best vehicle for law enforcement in order to right the criminal wrong that was committed. Admittedly, at its worst, this process can degenerate into political squabbling about which office will win a "turf battle" and whether the United States Attorney or the District Attorney will receive the credit for bringing the case. In determining the best means by which to punish bias crimes, however, we need not assume the worst of law enforcement.

A federal bias crime statute should give federal investigators and prosecutors the authority and incentive to pursue bias-motivated violence as vigorously as they might drug cartels or organized crime. Local authorities should do so as well. In cooperation, each may enhance the other's abilities. In states with strong bias crime statutes, and in municipalities with well organized and well trained bias investigation units, federal authorities may well decide to defer to state law enforcement. In states that lack these capabilities, federal authorities should, as they historically were charged to do in cases of outright state default, take the lead.

Despite all of the protections – doctrine and prudential – that are built into the risk of federal law enforcement overreaching in the context of the Hate Crimes Prevention Act, there will still be those who will fear that the statute holds just such a risk. To them there are two additional responses. First, it is highly noteworthy that this proposed legislation, and its predecessors going back a decade, have enjoyed broad support precisely from local law enforcement officials who understand the benefits to be gained by expanding upon the federal-state partnership that already exists in the investigation and prosecution of bias crimes. Second, under the proposed legislation, section 249(b)(2) will build in a strict set of certification requirements that limit the use of the Hate Crimes Prevention Act to cases in which the Attorney General or his direct designee has certified that:

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[91] Laurie L. Levenson, "The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial," 41 UCLA Law Review, 509, 560 (1994); Jim Newton, "Judge Rejects Talk of New Riots, Refuses to Delay Trial of Officers," Los Angeles Times, Feb. 3, 1993, at B4.

(A) The State does not have jurisdiction or does not intent to excise jurisdiction;
(B) The state has requested that the Federal Government assume jurisdiction;
(C) The State does not object to the Federal Government assuming jurisdiction; or
(D) The verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence."

The safeguards required by section 249(b)(2), along with the other safeguards discussed in this Statement that are based in long-established principles of federal-state cooperation in the important task of law enforcement more than meet any concerns about the pragmatic issues raised by the limited federal role in the investigation and prosecution of bias crimes contemplated by the Hate Crimes Prevention Act.

Conclusion

The punishment of bias crimes by the Federal government will not end bigotry in our society. That great goal requires the work not only of the criminal justice system but of all aspects of civil life, public and private. Criminal punishment is indeed a crude tool and a blunt instrument. But our inability to solve the entire problem should not dissuade us from dealing with parts of the problem. If we are to be staunch defenders of the right to be the same or different in a diverse society such as ours, we cannot desist from this task.

TESTIMONY OF DAVID RITCHESON, HARRIS COUNTY, TX

Mr. RITCHESON. Mr. Chairman and Members of the Committee, thanks for inviting me today to be a witness. My name is David Ritcheson, and I appear before you as a survivor of one of the most despicable and shocking acts of hate violence this country has ever seen in decades.

Nearly 1 year ago on April 22, 2006, I was viciously attacked by two individuals because of my heritage as a Mexican-American.

After a crawfish festival, I returned to a friend's house where I was going to spend the night. Shortly after arriving at this home, a minor disagreement turned into a pretext for what I believe was a premeditated hate crime. This was a moment that would change my life forever.

After I was sucker-punched and knocked out, I was dragged into the backyard for an attack that would last for over an hour. Two individuals, one an admitted racist skinhead, attempted to carve a swastika on my chest. After they stripped me naked, they burned me with a cigarette, and I was kicked by the skinhead's steel-toed army boots.

Witnesses recall the two attackers calling me a wetback and a spic as they continued to beat me as I lay unconscious. Once the attack came to an end, I was dragged to the rear of the backyard and left for dead. Reportedly, I lay unconscious in the backyard of the private residence for the next 8 to 9 hours. Fortunately, God spared me the memory of what happened that night.

Weeks later, I woke up in the hospital with so many emotions: fear, uncertainty, humiliation. America is the country I love, and it is our home. However, the hate crime committed against me illustrates that we are still, in some aspects, a house divided.

These are some of the many reasons I am here before you today asking that our government take the lead in stopping individuals like those who attacked me from committing crimes against others because of where they are from, the color of their skin, the God they worship, the person they love or the way they look, talk or act.

I spent 3 months in the hospital and had over 30 surgeries. Most of these operations were essential to saving my life, and others were necessary just to make my body able to perform what would be normal functions. My family would not have been able to afford these surgeries without help from our community and from all over the world.

My family told me of the crowded waiting rooms full of great friends. I heard about prayer groups in front of my school, the Klein Collins Campus.

As the recovery process continued, my family began to slowly tell me what had happened to me. I learned that one of the attackers, David Tuck, was a self-proclaimed racist skinhead who had viciously attacked at least two other Hispanics in the past few years, almost killing one of them. I learned that he had been in and out of several juvenile facilities and had just been released from the Texas Youth Commission. I was told that he had White power and swastika tattoos on his body.

How could this type of hate crime have occurred just miles from my home in a city as diverse as Spring?

I benefited from the support of groups such as the Anti-Defamation League and the League of United Latin American Citizens. There are so many people to thank for the support they have given me, including the ongoing encouragement to appear before you today.

Last November and December, I sat in a courtroom in Harris County, Texas, and I faced my attackers for the first time as they went on trial. I am glad to say that justice was done, and both individuals who attacked me received life sentences. Specifically, I want to recognize the great job that Assistant District Attorney Michael Trent did during the prosecution of these two individuals.

However, despite the obvious bias motivation of the crime, it is very frustrating to me that neither the State of Texas nor the Federal Government was able to use hate crime laws to prosecute my attackers. I am upset that neither the Justice Department nor the FBI was able to assist in the investigation of my case because the crime did not fit the hate crime laws.

Today, I urge you to approve the Local Law Enforcement Hate Crimes Prevention Act. I was fortunate to live in a town where police had the resources, the ability and the will to effectively investigate and prosecute the hate violence directed against me. But other bias crime victims may not live in such places. Local prosecutors should be able to look to the Federal Government for support when these types of crimes are committed. Most importantly, these crimes should be prosecuted for what they are: hate crimes.

I believe that education can have an important impact by teaching against hate and bigotry. In fact, I have encouraged my school and others to adopt the Anti-Defamation League's No Place for Hate program. If these crimes cannot be prevented, the Federal Government must he have the authority to support State and local bias crime prosecutions.

My experience over the last year has reminded me of the many blessings I took for granted. With my humiliation and emotional and physical scars came the ambition and strong sense of determination that brought out the natural fighter in me. I realized just how important family and the support of community truly are.

I will always recall my parents at my bedside providing me with strength and reassurance. They showed me how to be strong during my whole recovery, a process I am still going through today. Seeing the hopeful look of concern in the faces of my siblings, cousins, aunts and uncles every day was the direct support I needed to get through those terrible first few months. As each day passed, I became more and more aware of everything I had to live for. I am glad to tell you today that my best days still lie ahead of me.

Thank you for the opportunity to tell my story. It has been a blessing to know that the most terrible day of my life may help put another human face on the campaign to enact a much-needed law such as the Local Law Enforcement Hate Crimes Prevention Act. I can assure you, from this day forward, I will do whatever I can to help make our great country, the United States of America, a hate-free place.

Thank you.

[The prepared statement of Mr. Ritcheson follows:]

PREPARED STATEMENT OF DAVID RICHESON

I appear before you as a survivor of one of the most despicable, shocking, and heinous acts of hate violence this country has seen in decades. Nearly one year ago on April 22, 2006, I was viciously attacked by two individuals because of my heritage as a Mexican-American. After hanging out with a few friends at a local crawfish festival, my friend and I, along with the two individuals who would eventually attack me, returned to the home in Spring, Texas where I was to spend the night. It was shortly after arriving at this private residence that a minor disagreement between me and the attackers turned into the pretext for what I believe was a premeditated hate crime. This was a moment that would change my life forever. After I was surprisingly sucker punched and knocked out, I was dragged into the back yard for an attack that would last for over an hour. Two individuals, one an admitted racist skinhead, attempted to carve a swastika on my chest. Today I still bear that scar on my chest like a scarlet letter. After they stripped me naked, I was burned with cigarettes and savagely kicked by this skinhead's steel toed army boots. After burning me in the center of the forehead, the skinhead attacker was heard saying that now I looked like an Indian with the red dot on my forehead. Moreover, the witnesses to the attack recalled the two attackers calling me a "wetback" and a "pic" as they continued to beat me as I lay unconscious. Once the attack came to an end, I was dragged to the rear of the back yard and left for dead. Reportedly, I lay unconscious in the back yard of this private residence for the next 8–9 hours. It was not until the next morning that I was found and the paramedics came to my aid. I am recounting this tragic event from the testimony I heard during the trial of the two attackers this past fall. God spared me the memory of what happened that night. As I sit before you today, I still have no recollection of those life changing twelve hours or the weeks that followed.

Weeks later I recall waking up in the hospital with a myriad of emotions, including fear and uncertainty. Most of all, I felt inexplicable humiliation. Not only did I have to face my peers and my family, I had to face the fact that I had been targeted for violence in a brutal crime because of my ethnicity. This crime took place in middle-class America in the year 2006. The reality that hate is alive, strong, and thriving in the cities, towns, and cul-de-sacs of Suburbia, America was a surprise to me. America is the country I love and call home. However, the hate crime committed against me illustrates that we are still, in some aspects, a house divided. I know now that there are young people in this country who are suffering and confused, thirsting for guidance and in need of a moral compass. These are some of the many reasons I am here before you today asking that our government take the lead in deterring individuals like those who attacked me from committing unthinkable and violent crimes against others because of where they are from, the color of their skin, the God they worship, the person they love, or the way they look, talk or act.

I believe that education can have an important impact by teaching against hate and bigotry. In fact, I have encouraged my school and others to adopt the Anti-Defamation League's No Place for Hate(r) program. If these crimes cannot be prevented, the federal government must have the authority to support state and local bias crime prosecutions.

As the weeks in the hospital turned into months, I began hearing the stories of support that came from literally all over the world. The local community pulled together in a really majestic way, reaffirming my hope in the good of humanity. My family told me about the crowded waiting rooms full of the great friends from past and present. I heard about prayer groups before school in front of my school, the Klein Collins Campus. The donations that helped my family and me get through an unthinkable time poured in from generous people scattered across the globe. These donations would help pay for the enormous hospital bills from the over thirty surgeries I underwent during the first three months after the attack. Most of these operations were essential to saving my life—and others were necessary just to make my body able to perform what would be normal functions.

As the recovery process continued, my family began to slowly inform me of what had happened to me. They went on to tell me of the effective response by the Harris County Sheriff's Department and the Harris County Constables who had investigated the hate crime committed against me. I slowly began learning the about the background of the two individuals who had been arrested for attacking me. I was informed that one of the attackers, David Tuck, was a self proclaimed racist skinhead who had viciously attacked at least two other Hispanics in the past few years, almost killing one of them. I learned that he had been in and out of several juvenile facilities. Most surprising, I learned that he had been released from the Texas Youth Commission a little over a month before he attacked me. In fact, he was still on probation the night he nearly ended my life. I was told that he had "white

power" and swastikas tattoos on his body. I was informed that his older step brother, a major influence in his life, was also a self-proclaimed skinhead currently serving time in a Texas jail. Here I was, learning shocking details of a person who lived only miles from me and who had at one time attended the same high school that I attended. How could this type of hate be breeding just miles from my home in a city as diverse as Spring without anyone taking notice?

I quickly learned of and benefited from the support of groups such as the Anti-Defamation League (ADL) and League of United Latin American Citizens (LULAC). Both groups immediately provided whatever support they could to help me and my family. From setting up fundraisers to help my family with unanticipated expenses to providing emotional support confirming that I was not going through this alone, both groups were instrumental in assisting me and my family in the process of moving forward. There are so many people to thank for the support they have given me, including the ongoing encouragement to appear before you today.

Last November and December I sat in a courtroom in Harris County, Texas and faced my attackers for the first time as they went through their respective trials. I am glad to say that justice was done. I am proud of the job our county prosecutors and investigators did in ensuring life sentences for the two individuals who attacked me. Specifically, I want to recognize the great job that Assistant District Attorney Mike Trent did during the prosecution of these two individuals. However, despite the obvious bias motivation of the crime, it is very frustrating to me that neither the state of Texas nor the federal government was able to utilize hate crime laws on the books today in the prosecution of my attackers. I am upset that neither the Justice Department nor the FBI was able to assist or get involved in the investigation of my case because "the crime did not fit the existing hate crime laws." Today I urge you to take the lead in this time of needed change and approve the "Local Law Enforcement Hate Crimes Prevention Act of 2007". I was fortunate to live in a town where local law enforcement authorities had the resources, the ability—and the will—to effectively investigate and prosecute the hate violence directed against me. But other bias crime victims may not live in such places. I ask you to provide authority for local law enforcement to work together with federal agencies when someone is senselessly attacked because of where they are from or because of who they are. Local prosecutors should be able to look to the federal government for support when these types of crimes are committed. Most importantly, these crimes should be called what they are and prosecuted for what they are, "hate crimes"!

In fact, because there was so much attention focused on the fact that my case was not being prosecuted in Texas as a hate crime, the Anti-Defamation League and the Cook County (Illinois) Hate Crimes Prosecution Council published a Pamphlet called *"Hate Crimes Data Collection and Prosecutions:Frequently Asked Questions,"* designed to address some of the basic legal and practical considerations involved in labeling and charging a hate crime.

My experience over the last year has reminded me of the many blessings I took for granted for so long. With my humiliation and emotional and physical scars came the ambition and strong sense of determination that brought out the natural fighter in me. I realized just how important family and the support of community truly are. I will always recall my parents at my bedside providing me with strength and reassurance. They showed me how to be strong during my whole recovery, a process I am still going through today. Seeing the hopeful look of concern in the faces of my siblings, cousins, aunts and uncles everyday was the direct support I needed to get through those terrible first few months. As each day passed, I became more and more aware of everything I had to live for. I am glad to tell you today that my best days still lay ahead of me.

Thank you for the opportunity to tell my story. It has been a blessing to know that the most terrible day of my life may help put another human face on the campaign to enact a much needed law such as the "Local Law Enforcement Hate Crimes Prevention Act of 2007." I can assure you, from this day forward I will do what ever I can to help make our great county, the United States of America, a hate free place to live.

Mr. NADLER. Mr. Dacus?

TESTIMONY OF BRAD W. DACUS, PRESIDENT, PACIFIC JUSTICE INSTITUTE

Mr. DACUS. Thank you very much.

The Pacific Justice Institute, an organization which I am privileged to lead, focuses on the defense of religious and civil liberties.

From that vantage point, we encounter not just theoretical, but practical, real-life problems engendered by this type of legislation.

The Committee has already been apprised of the federalism concerns implicated by the legislation. I would now like to focus briefly on another problem with this legislation: The alarming potential, as evidenced by actual cases and situations, for well-intentioned hate crimes legislation to squelch free speech, particularly religious free speech.

This has been particularly evident in California, which has taken a very aggressive approach to hate crimes enforcement. Specifically, let me just give you point-blank an example for the sake of time. In California, the State capital of California, Sacramento, there was a day of silence, a day used to promote tolerance, and yet it was on this day of silence where some Slavic immigrants from the former Soviet Union, very firm in their religious beliefs and convictions on the matter, wore purely religious-based T-shirts with religious messages on the issue of homosexuality.

They were greeted not only with mocking and names, but they had food thrown at them and were punched, assault and battery, and then they were taken to the principal's office where they were told that they had to remove their shirts or be suspended for 2 days. After praying about it, they came back to the principal, and they said, "If we have to choose between being suspended and having to deny our faith, go ahead and suspend us because we will not deny our faith."

Members of this Committee, that was done under the context of hate crimes. That is exactly what we are talking about taking place in the State of California right now. To make it more specific, there was a case that came down in California called *Harper v. Poway Unified School District*. That was the case specifically. It was very, very similar to this case. The gentleman wore a T-shirt, offensive, the same subjects.

However, Judge Reinhardt, in his decision for the Ninth Circuit Court of Appeals, sort of famous in California, cited the hate violence education statute, College Education Code, Section 201 and 220, as justification for stifling a peaceful but politically incorrect opposing viewpoint.

Though there were no allegations of violence against Harper, the court nonetheless concocted a theory of "psychological assault" against homosexual students which it reasoned were just as harmful and, therefore, just as subject to censorship and sanction.

Once again, this is not a hypothetical. This is the reality. Fortunately for us, we have a Supreme Court that vacated that erroneous decision.

In addition to finding it in the public schools, we have something even more direct, and that is dealing with an actual pastor, not a theoretical pastor, an actual pastor. He is Pastor Yancey, a wonderful man with a strong conviction and belief in his Christian faith.

We were called to defend him after he was summoned before a local human relations task force pursuant to the county for distributing religious tracts. These tracts depicted 9/11 terrorist acts and stated, "Remember 9/11. In the name of Allah, they brought destruction and death to thousands. In the name of Jesus Christ, you can have eternal life."

Now it is hard to imagine a situation more in line with the Supreme Court's long list of leafleting precedents, such as *Martin v. Struthers* or *Watchtower Bible v. Village of Stratton.* Yet Pastor Yancey was accused of hate speech against all Muslims and was threatened.

Thankfully, we were able to successfully defend the pastor against these charges, but it is alarming—most alarming—to think that some officials believe that under the pretext of preventing hate speech, they can interrogate a clergyman concerning purely religious statements.

Ironically, by the way, Pastor Yancey served 20 years in the Marine Corps and understands religious freedom very well, as I am sure the Members of this Committee do as well.

Finally, we have an actual attempt to intimidate pastors through this procedure. It has been said that—we are dealing with complicity here—pastors cannot be prosecuted, as mentioned earlier. There is nothing wrong with free expression.

Well, if you were to take on one of these cases where one of their members is accused of a hate crime, there is going to be some interrogating. There are going to be some subpoenas. Pastors can be subpoenaed, every member of their parish, their congregation could be subpoenaed and intimidated to never mention certain words ever again Sunday morning or during our synagogue services. That is the reality that we are talking about with regard to the criminal process, and that is why we see this as such an egregious violation for liberty.

A decision by Congress to inject the Federal Government via this hate crimes bill into the culture wars of fundamental theological disputes can only engender further divisiveness and limitations on free speech. This Congress has sworn to uphold the Constitution and the rights therein, but if this hate crimes bill becomes law, which we contend is unconstitutional, then the Pacific Justice Institute and others just like us will have no choice but to heavily challenge it in the courts. I petition you to not put us in that situation.

Thank you for your time.

[The prepared statement of Mr. Dacus follows:]

PREPARED STATEMENT OF BRAD W. DACUS

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U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Crime,

Terrorism and Homeland Security

Hearing on HR 1592 – "Local Law Enforcement Hate Crimes Prevention Act of 2007"

April 17, 2007

Testimony of Brad W. Dacus, Esq.

Founder and President, Pacific Justice Institute

Sacramento, California

Honorable Members of the Subcommittee on Crime, Terrorism and the Judiciary,

I would like to offer a legal perspective on the pending hate crimes legislation, HR 1592.

The Pacific Justice Institute, an organization I am privileged to lead, focuses on the defense of religious and civil liberties. From that vantage point, we encounter a bevy of not just theoretical, but very practical, real-life problems engendered by this type of legislation.

The Committee has already been apprised of the federalism concerns implicated by the legislation. I would like to focus briefly on another problem with this legislation—the alarming potential, as evidenced by actual cases and situations, for well-intentioned hate crimes legislation to squelch free speech, particularly religious free speech. This has been particularly evident in California, which has taken a very aggressive approach to hate-crimes enforcement.

I. California: Case Studies in Censorship

Historically, both Congress and our judiciary have been vigilant to balance the rights of competing and even opposing speech rights of a wide diversity of individuals and groups, even when the views expressed are unpopular and perhaps even divisive. The Supreme Court summed up this hallmark of our Constitutional system well in its landmark decision *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). In that decision, the Court upheld the rights of students to wear black armbands in protest of the Vietnam War, against governmental concerns that such expression would disturb the peace and order of the school. The court stated as follows:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. **Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk,** and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society. (internal citation omitted, emphasis added)
>
> *Tinker*, 393 U.S. at 508-9.

Unfortunately, recent developments, particularly in California, where the Pacific Justice Institute is based, demonstrate that the rationale behind hate-crimes laws and similar efforts to provide greater protections to one group over another is undermining basic Constitutional protections, including free expression and freedom of religion.

A. *Harper v. Poway School District*

The law of unintended consequences—or perhaps intended consequences cleverly disguised—is starkly illustrated by the ongoing case *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), which originated in Southern California and was recently considered by the U.S. Supreme Court.

In *Harper*, a student responded to the pro-homosexual "Day of Silence," which was being heavily promoted on his high school campus, by wearing a t-shirt which expressed his religious viewpoint that homosexuality was "shameful." Instead of allowing a differing viewpoint, which was being peacefully expressed, school officials pulled aside Harper, demanded that he change his expression or face suspension. An Assistant Principal even suggested to Harper that he should leave his faith in the car while at school, in order not to offend homosexual students. *Harper*, at 1173.

Incredibly, the federal courts in California upheld the schools' actions. In one of the most sweeping, speech-restricting opinions I have ever read, Judge Reinhardt of the Ninth Circuit baldly asserted that Harper's free speech rights—which were undeniably strong under *Tinker* and related Supreme Court cases—were nevertheless trumped by the need to protect homosexual students from questioning their identity.

Not surprisingly, Judge Reinhardt's decision cited to California's "hate violence" educational statute, Cal. Educ. Code §§ 201, 220, et seq. as justification for stifling a peaceful but politically incorrect opposing viewpoint. Even though there were no allegations of violence against Harper, the court concocted a theory of "psychological assault" against homosexual students which, it reasoned, were just as harmful—and therefore just as subject to censorship and sanction.

California has shown that this is where hate crimes legislation inevitably leads. Once enacted, it is very difficult to "stop the train" or to limit its reach to actual crimes. Rather, it is used as a justification for all manner of restrictions, particularly against people of faith who raise religious objections to behavior they consider immoral. In fact, Judge Gould of the Ninth Circuit followed this exact line of reasoning in labeling religious opposition to homosexuality—even when expressed peacefully on a t-shirt—as "hate speech" which he equated with "a burning cross" (such as the KKK would employ) or "a call for genocide." *Harper v. Poway Unified Sch. Dist.*, 455 F.3d 1052, 1053-54 (9th Cir. 2006) (denial of rehearing en banc) (Gould, J., concurring).

The *Harper* decision sparked alarm throughout the legal community from a broad spectrum of legal scholars who were appalled that a federal appellate court was so willing to stifle free speech rights in order to favor a minority group perceived to need protection

from disagreement or dissent, cleverly labeled as psychological harm. See, e.g., "Sorry, Your Viewpoint is Excluded from First Amendment Protection," http://volokh.com/archives/archive_2006_04_16-2006_04_22.shtml#1145577196 (Prof. Eugene Volokh). While the decision has now been vacated by the Supreme Court, the litigation is ongoing. Meanwhile, other school districts in California have used the case as an excuse to stifle student speech in similar contexts, as I will explain next.

B. Backlash against the Slavic community in Sacramento

The organization I lead, Pacific Justice Institute, has represented students in situations very similar to Harper. Sacramento has a large population of immigrants from the former Soviet bloc, many of whom fled religious persecution. Last spring, a number of Slavic students were concerned about the Day of Silence and its blatant assault on their values. They determined to voice their views, like Harper, through t-shirts that peacefully expressed their religious beliefs disagreeing with homosexual behavior. As a result, more than a dozen students were suspended. Some of the Slavic students were physically assaulted because of their politically unpopular views; others were cursed, shown obscene gestures and intimidated—even by teachers.

Surprisingly—or perhaps not—the Slavic students were singled out for punishment, not only in the school context, but in the court of public opinion. In response to coverage of this and related incidents in the *Sacramento Bee*, it has been saddening to see the vitriol and hate that has been spewed at the Slavic community. Numerous online comments posted by SacBee readers have been racially and ethnically charged. A few examples in response to an article dated August 6, 2006, comments included the following: "They can send these bigots back to Russia on the first leaky

boat." "If they can't celebrate diversity then they should move." "If these people want to be Americans, they'd better realize what that means. It means accepting us queers." "They should be deported to some place like Cuba, Vietnam, Venzuela, [sic] or China where people havn't [sic] forgotten how to handle insane sects who embrace ideas from the Dark Ages. . . . Hate mongering is not protected speech – it's a crime." .

Tolerance, it seems, is becoming a one-way street. How, in such a professedly diverse city as the capitol of California, could there be such bigotry and intolerance of a politically unpopular viewpoint? It appears to flow in part from biased policy judgments, expressed through hate crimes laws and other means, that some minorities are better than other minority or even majority groups and therefore deserve heightened legal status. This viewpoint was stated by Judge Reinhardt in the Harper decision as follows: "There is, of course, a difference between a historically oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic and political status." *Harper*, at 1183, n. 28. In other words, backlash against individuals expressing a religious viewpoint can be ignored so long as it can be reasoned that they are not "historically oppressed," as groups like homosexuals are deemed to be. This is exactly what is happening in Sacramento, as the "hate crimes" rationale is being applied selectively in accordance with the prevailing winds of political correctness. This approach is not only dividing a city, but the pendulum has swung so far in the direction of protecting a few minority groups that the political losers—in this case the Slavic community and like-minded evangelicals—are beginning to legitimately fear for their freedoms to continue expressing their viewpoints in the public square.

Indeed, several of the comments posted on the Sacramento Bee's reader forum, read by thousands of individuals, have gone so far as to suggest that Slavic religious leaders be held criminally responsible for any violence which might be directed toward the gay community—even though the only assaults of which we are aware to this point have been directed *toward* the Slavic community, including a recent arson of a Slavic church in the Sacramento area.

If the public calls for prosecution of religious, politically-incorrect viewpoints seems far-fetched, consider the following examples, also from California.

C. *American Family Ass'n v. City and County of San Francisco*

In *AFA v. City and County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002), the Ninth Circuit upheld the legality of resolutions passed by the San Francisco Board of Supervisors which cast blame on religious groups for hate crimes such as the murder of Mathew Shepard in Wyoming. In breathtaking disregard for free speech and the "marketplace of ideas," San Francisco took official action urging local media outlets not to carry advertisements from the American Family Association's "Truth in Love" campaign, which iterated the group's Biblical opposition to homosexual conduct.

Even though there was no evidence linking AFA or any similar groups to violence against homosexuals, the Ninth Circuit held that San Francisco's allegation of a link constituted a sufficient "secular purpose" to insulate the City from an Establishment Clause violation. Thus, the City was free to openly condemn religious organizations and their viewpoints, even going so far as to pressure media outlets into turning down their advertisements, based on hate crimes not committed or even condoned by the organizations which ended up on the receiving end of the City's official condemnation.

II. Religious disagreements transformed into "hate crimes"

Lest it be thought that the problems with "hate crimes" labeling and legislation are limited to the issue of sexual orientation, it should be noted that prosecution of religious "hate crimes" also engenders significant First Amendment conflicts.

A. Pastor Audie Yancey

In a recent situation in Southern California, Pacific Justice Institute was called to defend a pastor named Audie Yancey, who had been summoned before a local "Human Relations Task Force" for distributing religious tracts. The tracts depicted the 9/11 terrorist acts and stated, "Remember 9/11: In the name of Allah, they brought destruction and death to thousands. In the name of Jesus Christ, you can have eternal life."

It is hard to imagine a situation more in line with the Supreme Court's long list of leafleting precedents, from World War II-era decisions such as *Martin v. Struthers*, 319 U.S. 141 (1943) down to the more recent *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002). Yet, Pastor Yancey was accused of "hate speech" against Muslims (it was wrongly assumed that "they" referred generally to Muslims). Thankfully, we were able to successfully defend the pastor against these charges, but it is alarming to think that some officials believe that, under the pretext of preventing "hate speech," they can interrogate a clergyman concerning purely religious statements. Ironically, Pastor Yancey served twenty years in the Marine Corps. His sacrifices were not for the purpose of diminishing the most basic freedoms we enjoy.

B. Hindu American Foundation report

Even more recently—February 18, 2007—a disturbing report was issued by the Hindu American Foundation called "Hyperlink to Hinduphobia: Online Hatred,

Extremism and Bigotry Against Hindus." (www.hafsite.org/hatereport) The report, which was distributed to all members of Congress, latches onto the buzz surrounding "hate crimes" and attempts to characterize peaceful, mainstream Christian efforts to proselytize Hindus as hate speech. The report wildly speculates that efforts to convert Hindus, including those which express the belief that Hinduism is demonic, could prompt a crazed gunman to attack a crowded Hindu temple in America. (HAF report, p. 6.) A review of the websites targeted by the HAF report as "hate speech" reveals that many, if not all, express purely theological and philosophical disagreements with Hinduism.

More alarming than the sensationalist rhetoric is the HAF's willingness to sacrifice free speech for the elimination of so-called "hate." The HAF report quotes approvingly Christopher Wolf, formerly for the Anti-Defamation League, who penned a 2004 article titled, "A Gay and Lesbian Guide to Legal Hate." In that article, Mr. Wolf wrote, "When one witnesses the anti-Semitic, racist, homophobic and Holocaust-denying websites that are proliferating, and the hate-mongers who are capitalizing on the Internet as a tool to spread their messages, a natural response is, 'There ought to be a law!'" HAF Report, p. 10. The HAF report proceeds to note that many European nations do, in fact, restrict "hate" on the Internet, and the report concludes by urging Internet hosting providers to "[t]ake the initiative in removing those websites from their servers which wantonly promote, in whatever way, hatred and intolerance towards Hinduism and its adherents or any other religion." HAF Report, p. 33. It bears repeating that HAF seems to think anything other than glowing affirmation of Hinduism constitutes "hate."

Fortunately, Mr. Wolf and the HAF have not yet succeeded in passing a law which restricts expression that they consider "hate speech." Unfortunately, their efforts

are nearing fruition with the consideration of HR 1529. We decry attempts by some religious groups to use the vehicle of "hate speech" or so-called "hate crimes" to silence diverse and differing viewpoints. This approach runs counter to every notion of tolerance, diversity and free expression which undergirds the American experience.

III. Conclusion

Given the foregoing examples, including open advocacy that certain religious viewpoints be squelched or criminally sanctioned, the concerns about HR 1529 are real. My testimony today, in focusing primarily on situations originating in California, does not even begin to address the countless examples from Europe, Canada, and Australia where freedom of speech has been subordinated in the last few years to protections against so-called "hate crimes," many of which involved no physical injury whatsoever. A decision by Congress to inject the federal government into the culture wars and fundamental theological disputes can only engender further divisiveness and limitations on free speech. Let us not forget that the road to hell is paved with good intentions. I urge you not to allow natural feelings of sympathy for crime victims to lead you to enact this sweeping legislation which will sacrifice fundamental constitutional rights on the altar of political expediency.

Mr. NADLER. I thank the gentleman.
And now we will hear from Dean McDevitt.

TESTIMONY OF JACK McDEVITT

Mr. MCDEVITT. Thank you very much, Chairman. It is a real honor today to be here to be able to stand in support of the Hate Crimes Prevention Act of 2007.

I have done 20 years of my life researching hate crimes, talking to police officers, talking to victims, and I think that we understand today that we are in the process of being able to really support and take this legislation to the next step.

In addition, I have trained thousands of law enforcement officers over the past 20 years on how to investigate and how to identify hate crimes, and in that training, I have learned how difficult hate crimes are for law enforcement to investigate and how they need the support of outside groups to be able to help them identify it.

I think that the legislation we consider today can significantly improve the lives of victims of hate violence by providing Federal assistance, by providing grants and providing additional information on crimes motivated by gender and gender identity and crimes committed by juveniles.

Many points have already been made. A couple of points that I wanted to touch on is this legislation—and the hate crime legislation around the country—protects all of us. It does not protect special groups. It protects everybody in this room.

If we were to look at the anti-race hate crimes in the last year, 11.5 percent of the incidents reported to the police were incidents of anti-White hate crime. When we are talking about hate prosecutions, the prosecutors go forward and bring hate charges on crimes that are motivated by hate, not in speech, and as we look at the State cases, we see that is the vast, vast majority of cases.

And one other thing, as an academic, I would say that the hate crimes reporting statute of 1990 provided information that would allow the academic community to work with law enforcement and work with prosecutors to give the law enforcement more tools to be able to answer these cases. We were able to develop a typology which allowed police officers to do better investigations and end up making batter arrests and getting better convictions.

So what I would say is that one of the keys that we have not touched on yet is the role of local law enforcement. As the Chairman said, this bill is to support local law enforcement. It is not to move law enforcement out of the way. What I found through years of working with local law enforcement is they are the keys to understanding hate crimes. They are the keys to being able to deal with it, identify it and then develop a case that can result in prosecution.

What we have learned from the 1990's is that the FBI has been a strong advocate of local law enforcement in helping to train officers in how they would identify and how they would investigate hate crimes. The FBI went around the country and did training after the 1990 act, and they have been still standing by to help.

But they have been limited by the ability of local law enforcement to call on them and resources. This legislation will allow local law enforcement to be able to have the opportunity to reach to the

FBI when they need it, to get the expertise to be able to conduct these investigations and to be able to then come forth with prosecutions about these crimes which really seriously do tear our society apart.

I think one of the keys to understanding all of this is that we understand that these are crimes which are serious to our communities. As you have said in some of your opening statements, these crimes can tear a community apart.

As we have spoken to victims around the country and we have talked to different groups, one of the things that we tend to hear over and over again is that victims feel much better if they are in a place where there is a statute that protects him. That is one of the most important things they say. Is there a statue? Is there something the police can do to protect us? This legislation will allow that across the country, to be able to have support, have resources and to be able to understand further the dynamics of hate crimes in the United States.

Thank you very much.

[The prepared statement of Mr. McDevitt follows:]

PREPARED STATEMENT OF JACK MCDEVITT

Testimony of
Associate Dean Jack McDevitt
Associate Dean for Research and Graduate Studies
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before

Subcommittee on Crime Terrorism and Homeland Security
Committee on Judiciary
U.S. House of Representatives
Room 2141
Rayburn House Office Building
April 17, 2007

I am very proud to appear today in support of H.R. 1592 The Local Law Enforcement Hate Crimes Prevention Act of 2007. I will use my time to address some broad issues of the characteristics and impact of hate crimes on our society and thus the need for this important Federal Legislation.

Background

I have been conducting research on various aspects of hate crimes for more than 20 years and have published two books and numerous reports, journal articles and book chapters. I co-authored the first national report on hate crime mandated by the 1990 Hate Crime Statistics Act, Hate Crimes 1990: A Resource Book published by the FBI in 1993. I also co- authored Hate Crime the Rising Tide of Bigotry and Bloodshed with Jack Levin in 1993 and Hate Crime Revisited : Americas War on Those Who Are Different in 2002.

In addition I have co-authored a number of U.S. Department of Justice reports dealing with the collection of hate crime statistics including Improving The Quality and Accuracy of Bias Crime Statistics Nationally in 2000 and Bridging the Information Disconnect in National Bias Crime Reporting in 2002. Both of these reports were done for the U.S. Department of Justice, Bureau of Justice Statistics and recommended ways to improve the accuracy of hate crime statistics.

In addition I have trained thousands of law enforcement officers across the country in how to identify and investigate hate crimes. In working with law enforcement officers I have come to understand how difficult many of these cases are to investigate and how this bill would assist local law enforcement in the investigation of these very serious crimes.

Nature and Magnitude of Problem

The terms "hate crime" and "bias crime," coined during the 1980s, refer to behavior prohibited by law in which the perpetrator's actions are motivated by bias against a particular group. Acts of violence motivated by bigotry and hatred have occurred throughout history including major acts of genocide such as the Holocaust during World War II, and the many acts of "ethnic cleansing" we have seen across the globe historically and today. Despite this lengthy history, it is only during the last three decades that this behavior has been defined as a hate crime in America and internationally and constructed as a social problem which required additional public policy and legislation.

This legislation that we consider here today can significantly improve the lives of victims of hate violence by providing significant federal assistance in the form of grants to local law enforcement and by directing the collection of additional information on hate crimes motivated by gender and gender identity as well as those crimes by and on juveniles. In 1990 when the first federal legislation was passed requiring data collection then President Bush declared "The Hate Crime Statistics Act is an important further step toward the protection of all Americans' civil rights. Our administration will work with Congress to determine whether new law enforcement measures are needed to bring hatemongers out of hiding and into the light of justice. And at the same time, by collecting and publicizing this information, we can shore up our first line of defense against the erosion of civil rights by alerting the cops on the beat" (Bush 1990). H.R. 1592 significantly extends and supplements this landmark legislation.

In 2005, a total of 7,160 hate crime incidents were reported to the FBI. Similar to other data on crimes reported to the police the 2005 figures represent an undercount of the actual number of hate crimes because many victims of hate violence do not feel comfortable going to the police to report crimes. The underreporting problem is even worse in the most recent 2005 data since two of the largest Cites in the United States New York and Phoenix failed to submit any data to the report for that year. I believe the legislation we are discussing here today would begin to reverse this problem of jurisdictions not participating in the FBI's hate crime reporting system by reemphasizing the Federal Government's commitment to protecting victims of hate violence and by providing grants as incentives to local agencies.

Though limited to those crimes that are reported to the police, national hate crime statistics provide a critical measure of the prevalence and distribution of hate crimes throughout the county. Between 1995 and 2005, the FBI reports the total number of hate motivated crimes reported in the national statistics remained relatively constant ranging from a low of 7,160 (2005) to highs of 9,730 (2001), see Appendix 1 which presents FBI statistics compiled by the Anti-defamation League (ADL) for the past 15 years. The relatively stable level of reported hate crime is more troubling when compared to other national estimates of violent and property crime (including the FBI's UCR Program) which have reported dramatic decreases in all types of crimes over the same period (FBI, 2005b).

The one group that experienced an increase in hate violence in 2005 were Hispanics. In a report in which virtually every other category of hate motivated crime decreased, reported crimes against Hispanic victims increased markedly - from 475 in 2004 to 522 in 2005. Even in face of substantial disincentives for Latino community members to report hate violence, the FBI has documented a disturbing increase in these crimes.

While we know that all hate crimes are not included in the FBI's statistics, it is useful to note that a review of the data from the past 10 years reveals remarkable stability in the categories across this period. Racial bias continues to be the most frequent bias motivation with 56.0% of the hate crimes in 2005 racially motivated. Approximately similar proportions of the remaining hate crimes in 2005 were motivated by other biases, religious bias, sexual orientation bias and ethnicity and national origin bias.

In addition to information about the type of victim, the national hate crime statistics provide useful information about the type of underlying crime that has been reported. In 2005, 30.2 percent of all hate crime victimizations involved destruction of property or vandalism, 30.3 percent involved actions intended to intimidate the victim, 18.7 percent were simple assaults, and 12.7 percent aggravated assaults. These figures indicate that in 2005 almost two thirds of all hate crimes reported nationally involved attempts to intimidate or physically harm the victim.

While some may seek to minimize the impact of hate motivated acts of intimidation, thinking they are minor crimes, these are among the most frightening of all hate crimes. As an example, if an African-American family moves into a white neighborhood and they begin to be harassed the entire family can be severely traumatized. Families in the past have had threatening phone calls, lead to threatening letters and e-mails, lead to threats to hurt family members, lead to physical damage to their property and often leading to a physical attack on a member of the family. Some have written of this process of threats and intimidation as acts of "domestic terrorism" and that is just how many victims of act of intimidation feel, terrorized.

Some have suggested that hate crime laws prohibit speech, this is not the case. These statutes, including the one we are discussing today, require a crime of violence in order to qualify for federal assistance in a local hate crime prosecution. It is important to note that hate crime statutes do not designate protected groups, they protect anyone who

is attacked on the basis of their race or other characteristic. For example, in 2005, 828 incidents or 11.5% of all incidents were anti- white. In order for this kind of legislation to be effective it is essential that these statutes protect all members of our society equally.

While the number of hate crimes reported is rather small compared to other crime categories, the impact of these crimes is very great. It has long been known that these crimes are about messages and as such each crimes is intended to send a message to all members of the target group that they are not welcome in the community, workplace or college campus (Levin and McDevitt 1993). As such, each hate crime affects many more people than the individual crime victim. These crimes can tear a community apart and pit neighbors against one another. Most importantly, these crimes threaten the very diversity that makes this Country great. If members of certain groups are afraid to move into or drive through a particular community for fear of attack, America is weaker for it. H.R. 1592 is a vital next step in sending the message that Americans will not tolerate hate motivated violence to be perpetrated on members of our society.

Impact on Victims

Research suggests that the effects of hate crimes are in fact unique and may produce a more serious emotional, psychological, and behavioral impact on victims when compared to similar crimes lacking a hate motivation. Victims of hate crimes often experience unusually high levels of fear and may demonstrate post-attack behavioral changes, including avoidance or high risk situations or desire for retaliation. In addition,

hate crime victims possess an increased risk for experiencing symptoms of depression or Post Traumatic Stress Disorder (Barnes & Ephross, 1994).

There are a number of reasons cited for this more serious impact. First victims have generally done nothing to initiate the attack or harassment. Victims in hate crimes are generally chosen because they are members of a particular group (or perceived to be members) not because of anything they have done. As a criminologist, we know that random acts of violence such as these are the most terrifying for victims. An additional element of these crimes involves the interchangeability of victims. Since victims are chosen based on membership not behavior, any member of the group is equally likely to be a target. If an African American family moves into an all white neighborhood, it does not matter which family has moved in, the offenders will attack any family regardless of what they have or have not done, simple because they are African American.

In a study I led in 2001 we found differences in victims' psychological reactions to being assaulted, depending on whether the attack was hate motivated or not. The study examined data on hate motivated assault victims and a comparison group of non-hate motivated assault victims. Results of the survey demonstrate that victims of hate crimes experienced increased fear and indicated a greater likelihood of experiencing intrusive thoughts, even controlling for the type and severity of crime. Effects experienced by victims of hate crime were more intense and lasted longer than those of the non-hate victims in the sample.

Overall, the victimization which occurs as result of hate crimes is unique in the fact that it is two-fold in nature and targets core identity issues. Like any crime, hate crime victims experience an initial or primary violation. However, hate crime victims may also experience a secondary form of victimization which can include stigmatization and even denial of resources based on their status. Like other victims of crime, victims of hate crime may ask "why me," question their perception of the world as a fair and equitable place, and even question their own worth. However, unlike other victims, the responses experienced by victims of hate motivated crimes when they do in fact report the incident to the police may result in an increased feeling of stigmatization or an increased feeling of future vulnerability (Berrill & Herek, 1990; Garnets et al., 1990).

It has also been noted by law enforcement officials and advocates that hate crime offenders do not specialize or target one particular group. Individuals who attack victims because of one characteristic (e.g., race) do not embrace others who they also view as different (e.g., gay men). While hate crime offenders may not specialize, it is the case that many victim groups experience unique consequences as a result of their victimization.

Race

Race has long been one of the difficult issues facing American society, so it is not surprising that as indicated above, crimes motivated by racial hatred are the most common category of hate crimes reported to the police. Furthermore, along with ethnicity and religion, race represents one of the original and most consistently protected statuses under hate crime legalization and initiatives. However, there currently exists

little research that examines in depth the effects of hate crime on victims of racially motivated violence.

Consistent with studies of hate crime in general, a defining characteristic of racially motivated hate crime appears to be the potential vulnerability expressed by victims. In a study of Black and White college students, Craig (1999) examined reactions to portrayals of hate motivated assault, general assault, and non-violent control scenes. Black participants rated the likelihood that they would find themselves in a situation such as the hate motivated assault significantly higher than White participants did. Additionally, Blacks were more likely than White participants to express suggestions that the victim of the hate crime should seek revenge (Craig, 1999).

It is important to recognize the continued existence of racism and the role social belief systems play in the occurrence of hate crimes. In a qualitative study of the responses of White students to the occurrence of a campus based hate crime, participants indicated they should not personally be held liable, because of their being White, for radicalized hatred targeted towards other racial groups (Jackson II & Heckman, 2002). However, the role of race relations in hate motivated crime goes beyond the extreme racist beliefs of a few. According to Perry (2002):

> Racially motivated violence is not an aberration associated with a lunatic or extremist fringe. It is a normative means of asserting racial identity relative to the victimized other; it is a natural extension—or enactment—of the racism that allocates privilege along racial lines (p.89).

Hate crime, and racialized violence in particular, targets core identity issues. Accordingly, it is important to understand the greater social and cultural context within

which such crimes occur. This understanding can facilitate more effective assistance to victims of crime targeted on the basis of their race.

Religion

In 2005, according to federal hate crime statistics, 15.7 percent of hate crime incidents were motivated by hatred based on religious affiliation. Of such religiously motivated incidents, 68.5 percent were anti-Jewish, 11.1 percent anti-Islamic, 4.6 percent anti-Catholic, approximately and 4.4 percent anti-Protestant.

From the earliest versions of hate crime legislation, religion has been included as a protected status, largely a result of the work of social advocacy organizations, particularly of the ADL. Representing one of the most longstanding anti-hate violence groups, the ADL has been documenting and publishing data on anti-Semitic and other forms of hate violence since 1979 (Jenness & Grattet, 2001). Currently, the vast majority of states have laws addressing crimes motivated by religious hatred, and 21 states and Washington, DC, have legislation specifically criminalizing interference with religious worship (ADL, 2006). According to audit results of the ADL, anti-Semitic incidents have declined in 2006 but the proportion of incidents occurring in schools and on college campuses has increased (ADL, 2006). One aspect of anti-religious hate crimes is the location of the acts of criminal violence. A majority of anti-religious hate crimes are targeted at property such as synagogues, churches, mosques, or cemeteries. It has been suggested that since it may be hard to identify potential victims as members of a particular religion it is relatively easy to attack a symbol of that religion such as a mosque, synagogue, or church (Levin & McDevitt, 1993).

Hate crimes perpetrated against Arabs and/or Muslims have increased dramatically following the events of September 11, 2001. Hate crimes motivated by anti-Islamic sentiment increased from 34 in 2000 to 546 in 2001—a 1,554 percent increase during this time period. Hate crimes based on national origin (other than Hispanic) increased from 429 in 2000 to 1,752 in 2001—a 308 percent increase. While such crimes have fluctuated sharply since 2002, the number of anti-Islamic hate crimes remains much higher than the pre-September 11, 2001 levels. Analysis indicates that anti-Arab or anti-Islamic hate crimes increase sharply and dramatically in response to global events. In addition, however, there is no doubt that law enforcement officials are now better trained and more aware of the possibility of these post-9/11 "backlash" crimes - and are, therefore, in an improved position to identify, report, and respond to these crimes more effectively. I have no doubt that the same dynamic will occur with gender, gender identity, and juvenile hate crime under this legislation's new data collection mandate.

Sexual Orientation and Gender Identity

There were 1,171 hate crime incidents targeting sexual orientation reported to law enforcement agencies in 2005, representing 14 percent of total hate crime incidents reported (FBI, 2006). According to the ADL, 31 states and the District of Columbia have hate crime laws that specifically include sexual orientation as a protected status, and 16 of those (50%) collect data relating to anti-homosexual hate crime (ADL, 2005b). The majority (60.9%) of incidents targeting sexual orientation that were reported by law

enforcement to the FBI were anti-male homosexual, 15.4 percent were anti-female homosexual, 19.5 percent were anti-homosexual, 2 percent were anti-heterosexual.

Research suggests that hate motivated crimes result in a severe set of consequences for members of the gay, lesbian, bisexual, and transgender (GLBT) community. Hate crime survivors had higher levels of depression, anxiety, anger, and post-traumatic stress symptoms than victims of non-hate crimes and non-victims (Herek et al., 1997; Herek et al., 1999). In addition, although many hate crimes were committed by only one perpetrator, hate crimes against gay individuals were more likely than non-hate crimes to involve two or more offenders (Herek et al., 2002), increasing the likelihood of serious injury. Research has also shown that violent hate motivated attacks against gay males are often more excessive and brutal than those against other groups (see Willis, 2004). In addition a recent report by the National Coalition of Anti Violence Programs identified a large proportion of the anti-GLBT assaults involved sexual assault or rape (NCAVP, 2006)

Perhaps more than for members of other groups, gender identity issues can be very complex for GLBT individuals, making victimization potentially more severe and complicated. Because anti-gay sentiment is still relatively acceptable in American society—we can see it from church pulpits, in statewide elections, and in a wide variety of media outlets—an individual identifying him or herself as GLBT, may alienate even the people closest to him or her. Despite this, hiding one's identity produces negative consequences and can make it more difficult to live ones life. Research has shown that

those persons who are committed to their gay identity and do not try hide it from others typically experience stronger psychological adjustment (see Garnets et al., 2003). Ironically, those who do identify themselves publicly as gay are increasingly likely to be victimized (Herek et al., 1997). Thus, embracing a gay identity may act simultaneously as a psychological buffer as well as a risk factor.

Lastly, the reluctance to report hate crime victimization is an essential factor to understand in working with victims of anti-homosexual hate crime. For example, Herek et al. (1999) found that victims targeted on the basis of sexual orientation were significantly less likely to report crime to the police. Victims may fear the insensitive or hostile response by police, as well as being "outted" as a result of reporting a hate crime (Kuehnle & Sullivan, 2003). Transgender victims appear to be among the most challenging of the GLBT victims. Presently there is so little understanding of this group and so much misinformation that they stand as a group that offenders feel they can attack without fear of reprisal. In addition, when victims do attempt to report to law enforcement they often find that these officials are either unable or unwilling to take the report and commence an investigation.

The concept of gender identity is an emerging issue in the academic literature. Research has demonstrated that hate crimes motivated by gender identity issues are among the most misunderstood and ignored hate crimes (Jenness, 2002). Often these crimes are ignored because the victim and law enforcement officials are not sure how to interpret the attacks. This bill will provide an opportunity to collect information on these

challenging incidents and will serve as a basis for deepening our understanding of how we might best protect these victims.

Disability

A group which has, until recently, often been ignored in the development and implementation of hate crime policy and legislation is that of disabled individuals. Hate crimes targeting disabled individuals are now legally proscribed in 31 states and Washington, DC (ADL, 2005b). Disabled individuals represent one of the largest minority populations in the United States, and victimization against the disabled is both prevalent and seemingly on the rise. Furthermore, this group is often disregarded in social, legal, and policy arenas. Both data collection efforts as well as law enforcement training procedures have infrequently addressed the disabled population. In fact in the most recent FBI hate crime statistics only 53 anti-disability hate crimes were reported, totally 0.6 percents of all hate crimes. Violence experienced by disabled individuals is often perpetrated in private and thus may be more veiled than other forms of group targeted violence.

Another important difference to recognize is that, unlike other hate crimes in which the perpetrator is generally a stranger or a group of strangers (Berek, 1990; Downey & Stage, 1999; Levin & McDevitt, 1993), the perpetrators of crime against disabled individuals are often known to the victim and many times may be a person on whom the disabled individual must depend (Waxman, 1991). Accordingly, attempts to assist this population must pay particular attention to the group's uniqueness as well as to

the fact that disabled victims represent a population that has often been overlooked and often only peripherally linked to hate crime initiatives.

Gender

Like sexual orientation, gender is often a controversial status category in discussions of hate crime. Gender was not included as a protected category under the original Hate Crime Statistics Act; it was added as a protected category in the Hate Crimes Sentencing Enhancement Act of 1994 (HCSEA), but it is largely overlooked. According to McPhail (2002), "the inclusion [of gender] remains more symbolic than realized as it is rarely invoked and remains controversial" (p.130). Despite passage of the HCSEA, the FBI still does not collect data on gender. Additionally, only 28 states and the District of Columbia have statutory provisions addressing hate crimes committed out of gender hatred (ADL, 2005b), and some of those laws appear to be relatively ineffective. For example, to prove a hate crime motivated by gender, some statutes require that the perpetrator must verbally denigrate women as a class, and in other states at least two restraining orders must have been filed against the perpetrator by two different women for hate crime charges to be filed (McPhail, 2002).

One of the main arguments used by opponents of gender's inclusion as a protected category is that crimes against women are typically committed by people known to the women, ostensibly violating the interchangeability criterion of hate crime. However, hate crimes do not require that the offender and victim be complete strangers, only that the offense be committed at least in part because of the victim's actual or perceived membership of a group. For gender motivated hate crimes, the challenge is

identifying when acts of violence against women are motivated by specific hatred of women as a class or are more broadly caused by existing power differences between men and women commonly found throughout American society.

One of the most challenging aspects of dealing with the issue of gender based hate crime is the lack of data about these incidents. H. R. 1592 will take a major step towards dealing with this issue. By including gender and gender identity as categories for reporting by local law enforcement, this bill will provide for the collection of data that will allow us to understand the dimensions and impact of these acts of violence in ways that we have never before had available to us.

Hate Crime Offenders and Offender Typology

As discussed previously, hate crime offenses differ significantly in their defining characteristics from other crimes not motivated by hatred. For example, the FBI has identified as an indicator of hate or bias crimes that these offenses tend to be excessively brutal where often the force used is far beyond what is necessary to subdue a victim. Furthermore, hate crimes are generally perpetrated on strangers in acts that can often appear to be random, senseless, or irrational. As discussed above, victims are selected based on their group affiliation, not personal attributes. Finally, hate crimes are perpetrated by multiple offenders more often than is the case in non-hate crimes (Levin & McDevitt, 2002).

Hate crime perpetrators may be somewhat distinct in comparison to other criminals. For example, in a study of undergraduate perceptions of hate crime victims and perpetrators, participants viewed perpetrators of hate motivated crime as being more

culpable than perpetrators of non-hate crime (Rayburn et al., 2003). Further, in a survey of law enforcement, the majority of hate crime investigators indicated that they viewed hate motivated incidents as more serious than similar crimes not motivated by hatred (McDevitt et al., 2000).

In a review of 169 hate crime cases investigated by the Boston Police Department, thrill hate crimes were found to be the most frequently motivation, distinguishing well over half of all hate incidents. Thrill crimes are characterized by a desire for excitement and may be typified by an immature desire for power. Thrill offenses are often perpetrated by groups of teenage or young adult offenders, with offenses occurring on the victim's "turf." In comparison to other perpetrators, there is often less of a commitment to hatred in such offenders (McDevitt et al., 2002). In many of these cases, young men looking for excitement or thrills decide to attack someone who they perceive as different. Based on messages they have received from our culture, these young criminals do not think anyone will care if they attack a member of one of these target groups.

Defensive hate crimes represent the next most common type. These crimes are committed when perpetrators attack victims believing that the perpetrator is protecting valuable resources or defending his or her neighborhood, workplace or college campus. As with thrill offenses, defensive crimes are often perpetrated by groups of teenagers or young adults, but in contrast, most defensive hate crimes occur in the offender's neighborhood not the victim's. It is the offender's "turf" being defended. A common

example of defensive hate crimes involves harassment suffered by a Black family who moves into an all White neighborhood (McDevitt et al., 2002).

The third most common hate crime motivation is that of retaliation. Retaliatory offenses occur in reaction to a perceived hate crime. Here, it is not important whether in fact an assault occurred, only that the offender believes it took place. Retaliatory offenders are likely to act out individually, often seeking out a victim to target in the victim's own territory. Victims are selected because they are perceived to be a member of a group even if they had no involvement in the original precipitating incident.

Finally, the least common, but potentially most critical motivation for hate crime offenders is that of mission offenders. Mission offenders perceive themselves to be crusaders whose lives are completely committed to hatred and bigotry. Mission offenders may operate in groups (in affiliation with an organized hate group) or alone (such as in the example of Timothy McVeigh) (McDevitt et al., 2002). While mission offenders are not actually involved in many hate crimes, they are involved in many of the most serious hate crimes. These offenders are typically very difficult to identify particularly by local law enforcement. They often cross state lines to attempt to instigate hate motivated violence. This legislation would significantly improve local law enforcement's ability to identify, investigate and ultimately prosecute these most serious hate crime offenders.

Overall, typologies categorize perpetrator motivation and can assist law enforcement and other agencies to better detect hate motivated crime when it occurs. In

fact, the FBI incorporates the McDevitt et al. (2002) typology in its agent training curriculum. These typologies also provide guidance for more empirically based research addressing the etiology of hate crimes and intricacies that may exist among diverse perpetrators. Ultimately, a better understanding of motivation for hate crime will lead to stronger policy and prevention strategies.

Juvenile Involvement Hate Crime

Much research has pointed to the number of juveniles involved in hate crimes. An analysis I participated in with other colleagues determined from National Incident Based Reporting System (NIBRS) data that 29% of the identified offenders in the national sample were under 18 years of age. An additional 26% were between 18 and 24 years of age resulting in fully 55% of the identified hate crime offenders being juveniles or young adults (Nolan, Mencken and McDevitt 2005). As with most crimes juveniles are disproportionately represented in hate crimes and part of the reason for this is their lack of experience and fear of the increasing diversity of our society. This legislation will advance our understanding of juvenile involvement in hate crimes, which the data cited above indicates is substantial, by increasing the amount of information available about hate crimes committed by or upon juveniles.

Role of Law Enforcement

It has long been known that one key to effectively addressing hate crimes is the role played by local law enforcement. Most hate crimes that come to official attention are first reported to the local police of sheriff's office. Supporting the work of these crucial

agencies is paramount if we are to deal with hate violence in a comprehensive manner. This legislation provides tools to local law enforcement to assist them in the investigation and prosecution of hate crimes. This is critically important assistance because of the unique challenges posed in the investigation of hate crimes. Our previous work on reporting of hate crimes identified that since hate crimes are relatively rare events, having expertise to draw from when an officer encounters a crime that she or he thinks might be hate motivated is essential to properly investigating and prosecuting a particular incident (McDevitt et al 2002). Since victims will often deny that bias was the motivation for the crime, responding officers must be trained on what questions to ask to properly identify if an attack if hate motivated. Questions such as the existence of prior threats and harassment, the excessive brutality of the attack, the language used in the attack can be important elements of the crime that could indicate that it was hate motivated. These indicators have been developed and circulated by the FBI who in the early 1990s trained a large number of local law enforcement agencies in techniques of identifying and investigating hate crimes. This legislation makes access to the FBI for this kind of expertise even more available. Additionally, these crimes do require additional investigatory time. The police must develop additional evidence of the bias motivation of the offender and this takes additional time and resources. The funding made available through HR 1592 will be highly valuable to law enforcement allowing them to spend the time that is necessary to solve these important crimes.

Hate Crime Reporting and Statistics

Over the last two decades significant efforts have been made to enhance the quality of information about the existence and prevalence hate crimes in the United States. With the passage of the Hate Crime Statistics Act (HCSA) in 1990, the Attorney General charged the FBI to establish the first national hate crime data collection and reporting program. Utilizing the FBI's existing Uniform Crime Reporting (UCR) Program, local, county, and state law enforcement agencies began to submit information about hate crime incidents to the FBI. Incorporating the new hate crime data collection effort into the UCR program was a critical decision, as the UCR program has been an accepted method of national data collection for over 70 years. Today more than 17,000 local, county, and state law enforcement agencies participate in the UCR program. Despite these advantages, hate crime data collection and reporting have remained challenges for many agencies.

The number of agencies participating in the national hate crime data collection program has grown considerably since the program's initial years. In 1991, 2,771 law enforcement agencies participated in the national data collection program by submitting statistics on the number of hate motivated crimes that come to the attention of their agency; by 2004, that number had grown to nearly 13,000 agencies. Even with this remarkable growth still only three-fourths of those agencies that participated in the general UCR program also participated in the national bias crime data collection program. As a result, the national statistics on hate crime are missing information from many police agencies across the country.

Despite the growth in the total number of agencies participating in the hate crime reporting program, many major cities report no hate crimes or surprisingly low numbers of hate crimes. Today nearly 85 percent of participating agencies report no hate crimes according to the most recent FBI report. While reporting zero hate crimes may accurately reflect the number of hate crimes in many jurisdictions, scholars suggest that some agencies, particularly in larger, more diverse communities, are not fully and accurately collecting information on and reporting hate crime (McDevitt et al., 2003). For example, in 2005 two states reported 0 hate crimes (Alabama and Mississippi). Similarly in 2005 , a number of major cities failed to participate in the data collection program, including New York City and Phoenix mentioned above. In total 5 Cities with populations over 250,000 failed to participate in the national reporting program and 20 cities between 100,000 and 250,000 population failed to participate in the program. The passage of this legislation with its opportunity to acquire federal grants should provide a strong incentive to local communities to participate in the important national crime reporting program.

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Appendix 1

Comparison of FBI Hate Crime Statistics 1991-2005															
	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991
Participating Agencies	12,417	12,711	11,909	12,073	11,987	11,690	12,122	10,730	11,211	11,354	9,584	7,356	6,865	6,181	2,771
Total Hate Crime Incidents Reported	7,163	7,649	7,489	7,462	9,730	8,063	7,876	7,755	8,049	8,759	7,947	5,932	7,587	7,466	4,558
Number of States, including D.C.	50	50	50	50	50	49	49	47	49	50	46	44	47	42	32
Percentage of U.S. Population Agencies Represented	82.7%	86.6%	82.8%	85.7%	85.0%	84.2%	85.0%	80.0%	83.0%	84.0%	75.0%	58.0%	58.0%	51.0%	N/A

Offenders Motivations															
	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991
Racial Bias	3,919/ 54.7	4,402/ 57.5	3,844/ 51.3	3,642/ 48.8	4,367/44.9	4,337/53.8	4,295/54.5	4,321/55.7	4,710/58.5	5,396/61.6	4,831/60.8	3,545/59.8	4,732/62.4	4,025/60.7	2,963/62.3
Anti-Black	2,630/ 36.7	2,731/35.7	2,548/ 34.0	2,486/33.3	2,899/30	3,884/35.8	2,486/33.3	2,901/37.4	3,120/38.8	3,674/41.9	2,988/37.6	2,174/36.6	2,815/37.1	2,296/34.7	1,689/35.5
Anti-White	828/ 11.6	829/10.8	830/ 11.1	719/9.6	891/9.1	875/10.9	781/9.9	792/10.2	993/12.3	1,106/12.6	1,277/16.1	1,010/17	1,471/19.4	1,342/20. 2	888/18.7
Anti-Asian / Pacific Islander	199/ 2.8	217/2.8	231/3.1	217/2.9	280/2.9	281/3.5	298/3.8	293/3.8	347/4.3	355/4.1	355/4.5	211/3.6	258/3.4	275/3.4	287/6.0
Religious Bias	1,227/ 17.1	1,374/18.0	1,343/ 17.9	1,426/19.1	1,828/18.8	1,472/18.3	1,411/17.9	1,390/17.9	1,385/17.2	1,401/15.9	1,277/16.1	1,062/17.9	1,298/17.1	1,162/17.5	917/20.1
Anti-Semitic	848/ 11.8	954/12.5	927/ 12.4	931/12.5	1,043/10.7	1,109/13.8	1,109/14.1	1,081/13.9	1,087/13.5	1,109/12.7	1,058/13.3	915/15.4	1,143/15.1	1,017/15.4	792/16.7
Anti-Semitic as Percentage of Religious Bias	69	69	69	65	57	75	79	78	79	79	83	86	88	88	86
Anti-Islamic	128/ 1.8	156/2.0	149/2.0	155/2.1	481/4.9	28/0.35	32/0.40	21/0.27	28/0.35	27/0.30	29/0.36	17/0.29	13/0.17	17/0.20	10/0.20

Ethnicity / National Origin	944/ 13.2	972/12.7	1026/ 13.7	1,102/14.8	2,098/21.6	911/11.3	829/10.5	754/9.7	836/10.4	940/10.7	814/10.2	638/10.8	697/9.2	669/10.1	450/8.5
Anti-Hispanic	522/ 7.3	475/6.2	426/5.7	480/6.4	597/6.1	557/6.9	466/5.9	754/9.7	491/6.1	564/6.4	516/6.5	337/5.7	472/6.2	498/6.2	242/5.1
Sexual Orientation	1,017/ 14.2	1,197/15.6	1,239/ 16.5	1,244/16.7	1,393/14.3	1,299/16.1	1,317/16.7	1,206/16.2	1,102/13.7	1,016/11.6	1,019/12.8	685/11.5	860/11.3	767/11.6	425/8.9
Disability	53/ 0.74	57/0.74	33/0.44	45/0.59	35/0.36	36/0.45	19/0.24	25/0.32	12/0.15	NA	NA	NA	NA	NA	NA

Compiled by the Anti-Defamation League's Washington Office from information collected by the FBI

More information about ADL's resources on response to hate violence can be found at the League's Website: www.adl.org

Mr. NADLER. Thank you.

And I thank the witnesses.

I will begin the questions by recognizing myself for 5 minutes. My first two questions are to Mr. Lawrence.

In his testimony, Mr. Lynch mentions the murders of Matthew Shepard and James Byrd as examples that Federal assistance is not needed. However, wasn't the Laramie Police Department forced to furlough five employees in order to fully investigate and prosecute the crime, and didn't Jasper, Texas, apply for and receive $284,000 in special Federal grants to enable it to do that?

Don't these two examples actually show that Federal assistance is needed to provide a crucial backstop for State and local authorities?

Mr. LAWRENCE. Absolutely, Mr. Chairman. In both cases, Federal authority was needed or Federal support was needed, and what actually happened in Jasper, Texas, where Federal funds were provided and where Federal support actually came because of the use of public highways, which, in fact, was only tangential in the reality of the case of James Byrd. It became essential because of the way in which the statute was written. The reality of the James Byrd murder case is it was a racially motivated murder. That is where the Federal interest came from. So I think that is exactly right.

I would also add that in both cases where they were murder cases, one is tempted to say you do not need an additional penalty because of the existence of the death penalty. The fact is the vast majority of bias crime cases are not murder cases. They are assault or vandalism. With the enhanced punishment, it would make a great deal of difference.

Mr. NADLER. Thank you.

And also, in his testimony, Mr. Lynch discusses the Supreme Court ruling in Lopez as limiting Congress's ability to federalize criminal activity on the basis of affecting interstate commerce.

Now there is a subsequent Supreme Court case, *U.S. v. Morrison*. Doesn't that case clarify Congress's authority in such matters and does this legislation meet the requirements for constitutionality as set forth in *Morrison*?

Mr. LAWRENCE. I think it does. I think *Morrison* actually is a case in which the Supreme Court struck down a part of the statute and gave a blueprint to Congress as to how to go about doing these cases in the future and these statutes in the future and make clear that they wanted Congress to be more careful as to how it implicated the Commerce Clause authority.

The exact piece of the Supreme Court ruling in *Morrison* was that a jurisdictional predicate was essential to uphold these statutes. That is precisely what this statute has. It requires a tight nexus between interstate commerce and the actual bias crime involved, and the prosecution must prove that and, as any other element of the case, must prove it beyond a reasonable doubt.

Mr. NADLER. Thank you.

Attorney General Shurtleff, one of the arguments we hear from opponents of this legislation is that it will interfere with the authority of State and local law enforcement. Your presence here today suggests that State authorities would welcome this legisla-

tion. You mentioned 26 attorneys general, which is a majority of the State attorneys general.

Could you give an example of how this legislation will be beneficial for State and local law enforcement?

Mr. SHURTLEFF. Mr. Chairman, thank you.

After September 11 and before Utah had an enforceable hate crimes statute, a man bombed a local Pakistani restaurant named Curry in a Hurry. Because Utah did not have an enforceable law, we absolutely had to rely on the limited Federal Government jurisdiction in that case to be able to bring some punishment.

Mr. NADLER. Since Utah now has such a law, why do you need a Federal law?

Mr. SHURTLEFF. Well, in fact, we have a law. It is not based on categories. It is only based on an enhancement that the judge can give. It is not an automatic enhancement. So we prefer the ability to have very articulated categories.

It is also the fact that it consistently says "at the request of the State," working with the State or local authorities. We have some excellent relationships with the Federal Government when it comes to crimes that cross State borders—for example, Project Safe Neighborhood involving guns or Internet Crimes Against Children, Project Safe Childhood, and so forth.

In this case, in these types of crimes, so often the target group goes beyond State borders. In those situations, we really need the Federal Government to step in and help us out.

Mr. NADLER. Thank you.

Some opponents claim that this legislation will interfere with first amendment rights of speech and association by requiring prosecutors to inquire into assailants' past associations to prosecute cases. Briefly, because I have one more question, can you speak to this issue?

Mr. SHURTLEFF. Absolutely. In fact, those examples given by Mr. Dacus are really red herrings because none of those would be charged in this case because you have to have a specific felonious crime, a crime of violence, plus the perceived motivation by prejudice or bias.

But in addition, it specifically states in the rules of evidence that prosecutors cannot use evidence of expression, of their associations. They may belong to hate groups, they may have actually written things regarding their hatred toward certain groups, but we have to be able to use those as exact evidence of the crime and the evidence specifically relates to the crime.

So you would have to have a situation where the pastor, for example, in a meeting would say, "Let's go burn down a mosque because Islam is the devil," and then lead the group down there to burn the mosque.

Mr. NADLER. Okay. Thank you.

Final question, Dean McDevitt: The legislation would add gender and gender identity to the categories of hate crime statistics collected by the FBI. Briefly, why would the addition of these categories be so crucial in your opinion?

Mr. MCDEVITT. I think that one of the things that we can start to understand in this by starting to get the data for this is: What is a gender hate crime?

I think that different States are struggling now with how to define it—as you have seen in different States, some of the limitations on how to define it are really setting the bar awfully high—and also gender identity crime. This will allow the FBI to accumulate information and pass it back to local law enforcement about what are the characteristics of these crimes so they can investigate them, so they can go forward and be able to prosecute them.

Mr. NADLER. Thank you very much.

My time is expired. I now recognize for 5 minutes the gentleman from Texas.

Mr. GOHMERT. Thank you, Mr. Chairman.

First of all, Mr. Ritcheson, you certainly have the sympathy and the admiration of all of us here on this panel and I think the witnesses with you. What you went through is intolerable.

As I understand it, the perpetrators were prosecuted under local law—is that correct—State crime law? Is that your understanding?

Mr. RITCHESON. Yes, sir.

Mr. GOHMERT. And did they both get the life sentence?

Mr. RITCHESON. One of them, David Tuck, received a life sentence, and Keith Tanner received 90 years.

Mr. GOHMERT. How many years?

Mr. RITCHESON. Ninety years.

Mr. GOHMERT. Ninety years.

Mr. RITCHESON. Yes, sir.

Mr. GOHMERT. And in Texas, anything over 60 years is computed as a maximum or a 60-year sentence.

So the law we are passing today, as horrible as that was in your situation, this law really would not affect it. They already basically got, in effect, a maximum sentence under State law. Is that right?

Mr. RITCHESON. Yes, sir.

Mr. GOHMERT. Okay.

Dean Lawrence, you had mentioned the mental harm that obviously accrues to anyone who is a victim of a hate crime. Have you done any or have you seen any studies on the mental harm to victims of random, senseless acts of violence? Are you saying they are not affected nearly like somebody that is a victim of a hate crime?

Mr. LAWRENCE. No, I would not say that they are not affected at all, certainly, and that is why there are severe penalties for those crimes. But I guess I would say two things.

One is that studies that have been done and cited in my written testimony show that overwhelmingly victims of bias crimes do suffer higher levels of depression, of hypertension and of a sense of alienation from society. It is hard to do exact comparisons, because what would the exact same crime look like without bias motivation, but the studies that have been done, both in the workplace and in other studies, demonstrate that.

The other thing, of course, is that this statute itself is not a penalty enhancement statute. It is about giving additional Federal authority——

Mr. GOHMERT. Well, you are aware it sets new penalties. It creates new hate crimes. Are you aware of that?

Mr. LAWRENCE. Correct.

Mr. GOHMERT. Yes.

Mr. LAWRENCE. But the point is that what this is really about is the articulation of a special category of crime, and although I certainly believe and have written that there should be——

Mr. GOHMERT. Well, basically, we are federalizing a State crime at this point. Certainly, it is federalizing Texas State crime, and I appreciate your perspective.

Attorney General Shurtleff had indicated we need federal—and I have heard you say a couple of times this will only apply to felonious assaults or actions.

You are aware of the language in this bill that makes it a crime for bodily injury—and I am not familiar with Utah laws—but in Texas, bodily injury is a simple assault, even just pushing somebody, even touching somebody offensively, where someone can claim even no matter, as the law says in Texas, how temporary the pain or discomfort might be. That is sufficient to be bodily injury. You are aware of that right?

Mr. SHURTLEFF. Well, I am aware that there are actually two different types of crime described. The one is at the request of the State they can come in only in the case of violent felony plus——

Mr. GOHMERT. Well, I am asking you specifically about the offenses that are created here and the conduct that is addressed and that it involves either something involving a fire, a fire arm or something like that, but there is an aura between those, and the first one is for causing bodily injury. You have seen that, right?

Mr. SHURTLEFF. I have seen that. I was trying to explain, Representative, that it is two-part. That part has to do with the specific evidence of crime being involved with interstate commerce and across State borders and so forth. Yes. In that case, it is limited in within those certain categories, but it also, in section 4, requires a violent felony.

Mr. GOHMERT. Well, but that does not address my point. You keep saying felonious conduct. In Utah, is a simple assault a felony?

Mr. SHURTLEFF. No, it is not, but I am saying this proposed law does include both the felonious conduct and also different types of crimes for——

Mr. GOHMERT. Okay. So you referred to it as felonious because we are creating a new law that makes a simple assault a felony under Federal law. But, right now, as the law stands, it is not felonious conduct to simply push somebody or commit a simple assault. Isn't that correct?

Mr. SHURTLEFF. It is, but as I am trying to point out to the representative, there two parts in this proposed law. What I refer to as the felonious conduct is one section. You are referring to another section. You are absolutely correct. In that section with regard to interstate commerce, it only requires battery which would not be a felony.

Mr. GOHMERT. Okay. Well, I appreciate you making the distinction that there are two parts because, earlier, you made the blanket statement that this will only apply to criminal felonious conduct, and you broke that up, but I am glad you clarified so it does not just apply to felonious conduct.

Also, I would like to comment in my last 30 seconds. The Chairman had made the comment about my opening statement, and I

have tremendous respect for the Chairman. I admire him greatly as an individual.

You talk about the debate and conduct. We go after it pretty good with words in this body, but I know you would never harm me physically and I would never harm you physically, and that is a distinction that we make. So, hopefully, we will not end up committing crimes just by our debate.

But I thank the Chairman.

Mr. NADLER. I would point out the last caning on the floor was in 1859 and helped bring on the Civil War.

Thank you very much.

I will now recognize the distinguished gentleman from Michigan, the Chairman of the Committee.

Mr. CONYERS. Thank you, Mr. Chairman.

Boy, am I relieved to find out that we will not go to violence in this Committee now that Mr. Gohmert has assured me of my safety.

And I can mutually assure you of your own, Mr. Gohmert, as one who has supported and led this legislation for a decade.

Let me start with Mr. Dacus, because I want you to know that this is a pretty friendly Committee you are coming before. There are different kinds of Committees, different levels of debate, but I just want you to be assured—and I want to know that you are—that unless there is a violent act involved in the act being debated, there is no hate crime involvement at all.

And so that would mean, sir, that every one of your examples would not have any application to the bill that is under consideration.

Mr. DACUS. May I respond?

Mr. CONYERS. Yes, of course.

Mr. DACUS. Thank you. I appreciate you making that point.

The truth of the matter is, in California, the first thing that was enacted was a hate crime bill based upon harm, and now built from that was the California Education Code section which was cited by Reinhardt, and specifically 220 directly applies in references to those violent hate crimes.

Mr. CONYERS. In other words, you are telling me then that there can be prosecutions that do not involve violent conduct?

Mr. DACUS. In California, that is correct, and the point is that first we had the hate crimes involving violence, and then from there we have built these other legislative avenues.

Mr. CONYERS. Okay. Let's do this——

Mr. DACUS. That is the road we have started down.

Mr. CONYERS. Can I send you some information about that? Because I see that this is going to take up more time than I wanted. I did not know you were aware of what I am saying, but we will all stay tuned.

Now, ladies and gentlemen, the fact of the matter is that we have been federalizing State criminal conduct for a long time. I mean, this is not a new leap into criminal jurisprudence. And I do not know why my staff calculated this on the basis of Federal crimes enacted into law during Republican control of the Congress, because I am sure Democrats did it as well, but I count at least

about 20 different Federal crimes which were already a crime in the State.

So it seems to me that to come at this late date to discuss whether this is constitutional or not is a little too late. I am sure it is going to be tested in the courts, that is the American way, and we expect that it will be.

This concept started in 1985—Barbara Canales started the introduction of this legislation, and it has evolved, I think, in a very important and significant way, and so I want all of us to realize that we are not doing anything really that new here. What we have done is refine and tailor in a very important way.

Now, as the one person on the Committee and almost in the Congress that was here for the Voter Rights Act of 1965, this discussion is sort of amazing. We are always in a circular path here instead of trying to move forward. We come back to some of the seemingly lame excuses for why we should not go forward.

The Chairman of this Subcommittee has indicated there are thousands of these acts still going on, and what we need to understand is that we are not taking jurisdiction away from States; we are only complementing them where it is necessary, and so it is in that spirit that I commend all of the witnesses for coming today to join in what I hope will be the final set of hearings on hate crime legislation in the Congress.

Mr. NADLER. I thank the gentleman.

I now recognize for 5 minutes the gentleman from North Carolina.

Mr. COBLE. I thank you, Mr. Chairman.

As our distinguished Chairman from Michigan said earlier, one of the reasons for being here is to engage in dialogue and to express some disagreements if, in fact, there are any.

I appreciate the witnesses being here today.

I would like to know—and perhaps I cannot get it today—if the number of reported hate crimes has decreased since 1995. I think that is the first year that a hate crimes report was published. Furthermore, several States have enacted hate crimes, and I would be interested in knowing also what sort of impact those State enacted crimes have had on the number of reported hate crimes.

The problem I have with hate crimes is I fear that for the most part they are duplicative. A crime is committed. It seems to me, in most cases, that would be addressed or there would be a remedy on the books already. So we will talk about that at another time.

David, we thank you for being here, and I am pleased that your attackers were awarded extended sentences. They obviously deserved it, from what you tell us.

Mr. Lynch, you commented about the relocation of the FBI resources for terrorism, and I think there is some merit to be said for that. Do you have any concerns with the definitions proposed by H.R. 1592? And, if so, share them with us.

Mr. LYNCH. It is not so much the particular nitty-gritty definitions, Mr. Chairman. I think, going back to your point about it being duplicative, these are federalizing crimes that are already on the State and local books, and once they are on the Federal books, then there will be pressure for Federal investigators and Federal prosecutors to start investigating those crimes, the stuff that is al-

ready being prosecuted at the local level. And that is necessarily a diversion from what I think should be the FBI's main focus, which is foreign threats, espionage, al-Qaeda and so forth.

Mr. COBLE. I thank you, Mr. Lynch.

Mr. Dacus, what effect, if any, would result from criminal investigations that focused on an accused's political views, philosophy, prior statements, membership in organizations, once the motive for the crime is an element, A; and, B, what checks, if any, are there on Federal prosecutors seeking access to such information?

Mr. DACUS. Well, to answer the first question, you basically have inquisitions of not only individual's faith and beliefs, but with regards to those he knows, his friends, his clergy, his family, and not just immediately, but those in the past, going back as far as the prosecution felt necessary. That is, in essence, what we would have as a religious inquisition or political inquisition, and I think that is abhorrent to the whole concept of civil rights and true civil liberties.

As far as what you said with regard to what checks are in place, I like to contend that I am an expert to be able to answer that, but I am not. I can just simply say that, presently, there would generally tremendous discretion to inquire is needed so as to justify proving up the case, but I think there would be others who are more equipped perhaps, our former attorney general from California perhaps might be even better than that to answer that part of the question.

But without question, it would open the door for inquisitions, and that is not an if. It is just a matter of when and who is going to have to face it, like the pastor faced that I mentioned earlier.

Mr. COBLE. Thank you, Mr. Dacus.

Mr. Chairman, I see the red light is not yet illuminated, so I will yield back my time.

Mr. NADLER. I appreciate that, despite the fact that the red light has not yet flashed. I thank the gentleman.

With that, I will recognize for 5 minutes the gentlelady from California.

Ms. WATERS. Thank you very much, Mr. Chairman. I would like to thank you for holding this hearing.

I would like to thank Mr. David Ritcheson for coming in sharing with us what you went through and how your life was endangered by a hate crime, and while the State to prosecute, there are many States that still are insulated and are not prosecuting.

But I know that I am not going to be the law-and-order person on the Committee today. I am considered a liberal, a progressive, and I have colleagues on this Committee who are law and order who look for ways to get tough on crime and who use every opportunity to try and make sure that we catch criminals who not only commit crimes, but heinous crimes.

I am also sitting here and reflecting on the history of this country, and I am thinking about Emmett Till who was murdered, the young man that went down during the summer from Chicago to Mississippi, and who was badly beaten and killed. When his body came back, it was on the front pages of all of the Black newspapers and magazines in the country. There was never any prosecution in that case.

And I am thinking about the four little girls in Alabama, who were bombed at church and the fact that it was just last year that I think we finally brought someone to justice on that.

But, of course, history is replete with cases of people of color that are harmed, killed, maimed, and still today in 2007. We hear about cases in small towns and cities and States where we do not think we are getting justice.

So I know that all of our panelists here today would like to see everything possible done to apprehend and prosecute people who commit hate crimes, and I think that despite the fact that there has been some discussion about Federal jurisdiction, I think everybody at the table would say that you would support apprehending and bringing to the bar of justice anyone that would harm, kill or maim someone based on color or religion.

Is that right? Do we have anybody that disagrees with that?

Mr. Lynch?

Mr. LYNCH. Restate that, please.

Ms. WATERS. You talked a lot about Federal jurisdiction, and under 18 USC 245(c), only if a crime motivated by racial, ethnic or religious hatred is committed with the intent to interfere with the victim's participation in one or more of these activities, you would agree with that.

I mean, you do not really object to the Federal jurisdiction that is in existing law now for hate crimes?

Mr. LYNCH. Well, I do think there are some problems with existing law. It depends upon——

Ms. WATERS. You think it goes too far?

Mr. LYNCH. It depends upon what section of the Constitution this Federal statute rests upon. Is this based upon the Commerce Clause? Is there some type of connection between a Federal prosecution here and commerce? I think that that is problematic under the Supreme Court's ruling in the *Morrison* case.

Ms. WATERS. So it is your belief that there should be no Federal jurisdiction whatsoever, it costs too much money, it takes up too much time of the FBI, et cetera, et cetera? Is that what you believe?

Mr. LYNCH. No. When you mentioned the Emmett Till case, there was actually a criminal prosecution involved in the murder of Emmett Till, but what you may recall, there was not a just result in that case. The State court proceedings were thoroughly corrupt in that murder prosecution, where you had basically a corrupt sheriff. I believe he testified on the behalf of the defendants in that case, and so the proceedings in the State court prosecution were thoroughly corrupt. I do think under section 5 of the 14th amendment, there is a basis for Federal prosecution against State officials acting under the color of law for violating the rights of individuals. So, in that respect, there is Federal jurisdiction.

Ms. WATERS. But you talk about Federal prosecution for those acting under the color of law. I am talking about the perpetrators of hate crimes. You believe that there should be no Federal jurisdiction for perpetrators, that that should be left to the States. Is that right?

Mr. LYNCH. Yes, I would have to——

Ms. WATERS. You think we go too far if we do everything possible to apprehend and prosecute, and to make sure that these insulated jurisdictions who do not carry out their duty and carry out the law, we should not spend too much money and time on that kind of thing. It is unconstitutional. Is that what you believe?

Mr. LYNCH. Well, you have mentioned insulated jurisdictions, and as I read the bill and the findings, there is no finding in this bill that State and local jurisdictions are being derelict in their duty and are failing to prosecute violent crime.

Ms. WATERS. Unanimous consent for 30 more seconds.

Mr. NADLER. Without objection.

Ms. WATERS. Thank you very much.

The findings may not be particularly identified as set forth in this legislation, but the Chairman of the Judiciary Committee, who just cited his tenure here in Congress, this African-American man, does not need to have anyone tell him that there are no findings that such things happen. He knows from experience.

I yield back the balance of my time.

Mr. NADLER. I thank the gentlelady.

I now recognize for 5 minutes the distinguished gentleman from California.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

I frankly have not made up my mind on this bill yet because of the number of different issues that are presented. On the, you know, basic question about hate crimes as to whether they are totally duplicative or whether they have a separate legal basis, I think the Supreme Court answered that when, on the one hand, they found unconstitutional one State hate crimes in the 1990's and then later on upheld another.

When I was attorney general of California, we declined to submit an amicus brief with respect to the one that was turned down because we did not think it was articulate enough in defining the difference between conduct and thought, and yet the second one, which paralleled the California statute, did pass constitutional muster.

I think the question here is really what would be the effect of this law. I mean, that is what I am trying to figure out.

I think it was 1991 in California. We had a total of about 3,500—that is 3,500—murders in our State, yet we did not believe that most murders should be taken over by the Federal Government because of the numbers.

I asked staff to get me the numbers of the hate crime incidents reported, and at least according to official documents, in 2005, there were 7,163 hate crimes reported, and in that same year, there were 1,017 violent incidents reported based on bias for sexual orientation, so approximately four incidents per million of population of violent incidents based on bias for sexual orientation versus the national crime rate of 492 incidents per 1 million, or 1.4 million overall.

I do not mean to slight any crime whatsoever, I want it to be very clear, or any victim of any such crime, but the question is: Where are we going to array our assets? If we pass this bill, do we really believe that the FBI will have the opportunity to spend significantly more of its time on investigating these hate crime cases?

If so, will that be to the exclusion of other things that we are attempting to get them to do?

This Committee knows and the Crime Subcommittee knows that we are having a difficult time having the FBI transform itself into an elite counterterrorism operation right now. So it is really not a question for me as to whether there is an absolute constitutional predicate, although I do think there are some questions we have to answer.

It is a question, Mr. Lawrence, of what do you think we will achieve by this. If this bill passes, is it your belief that a significant portion of the assets and personnel of the FBI will be directed to this and that that would be the substantial good that would be done by this bill?

Mr. LAWRENCE. Absolutely not. I think the substantial good that would be done is that in certain instances, the FBI—and ultimately the U.S. attorney's offices—would be available as a significant and very important backup to State law enforcement.

But this is not just hypothesizing. The bill itself specifically sets out very strict requirements for Federal involvement, requires a certification by the attorney general or the attorney general's designate, and that in itself is limited to specific circumstances in which the State asks to be involved, in which the State declines jurisdiction, or other very, very limited situations.

One would expect that States that had strong bias crime laws, bias crime investigatory units and prosecutorial offices would use very few Federal resources on this and perhaps none. One would expect that States that do not would use more. Overall, one would expect not to have a major diverting of attention by the FBI. Quite the contrary, one would expect to have expertise by the FBI in very targeted areas in situations in which the States do not have the political, financial or expertise to bring to bear on these cases.

Mr. LUNGREN. I thank the gentleman.

Mr. NADLER. I will now recognize the distinguished Member from Georgia.

Mr. JOHNSON. Thank you, Mr. Chairman.

I would like to first say how much I appreciate the efforts of Chairman Conyers in doggedly pursuing this legislation throughout the years.

This legislation removes unnecessary jurisdictional barriers to permit the U.S. Justice Department to prosecute violent acts motivated by bias and hate and complement existing Federal law by providing new authority for crimes where the victim is intentionally selected because of his or her gender, gender identity, sexual orientation or disability.

Now Mr. Dacus is it—or Dacus?

Mr. DACUS. Dacus.

Mr. JOHNSON. Yes. It is interesting that you claim to decry attempts to silence diverse and differing viewpoints, including those who would condemn homosexuality or those who would condemn persons who practice Islam, but yet isn't it a fact that you were recently involved in representing a number of parents in California in filing administrative complaints with their school districts to opt their children out of lesson plans that taught information about Islam? Yes or no?

Mr. DACUS. That taught information about Islam or had them engage in Islamic chants?

Mr. JOHNSON. You tried to——

Mr. DACUS. Yes, engaged in Islamic chants, and, yes, we defended the rights of parents to opt their children out of engaging in Islamic chants. That is correct in that regard.

Mr. JOHNSON. And, sir, is it your——

Mr. DACUS. Unabashedly.

Mr. JOHNSON. Yes. And, sir, is it your opinion that the act under consideration here covers only violent crime, or does it cover hate speech or speech?

Mr. DACUS. Well, the point I was trying to make is that——

Mr. JOHNSON. No, no. I mean, answer my question. Now does it cover speech? Does it——

Mr. DACUS. Oh, like the original law in California, it covers crime, and then California then extended that, as we know is expected to happen here.

Mr. JOHNSON. Have you read H.R. 1592?

Mr. DACUS. Yes, I have.

Mr. JOHNSON. Okay. And I will turn your attention to section 249. Do you have it in front of you?

Mr. DACUS. Yes, I do. Wait a second. Let me find it.

Mr. JOHNSON. Section 249. It is on page 10. Are you with me now?

Mr. DACUS. Yes.

Mr. JOHNSON. It prohibits certain hate crimes, and it talks about what a hate crime is, and in general, at Subsection A(1), it says "offenses involving actual or perceived race, color, religion or national origin," whoever, whether or not acting under color of law," willfully causes bodily injury to any person, correct?

Mr. DACUS. That is correct.

Mr. JOHNSON. So it does not say anything about just simply someone who speaks out against something that you may disagree with. It talks about violent crime, and this law would give the feds jurisdiction to cover situations such as the one that Mr. Ritcheson, seated beside you had to undergo where he was pummeled almost to death because of his status of being a Latino.

So this legislation would simply cover those individuals who were attacked because of their race, creed, national origin, sexual orientation.

Mr. DACUS. That is right. It would not——

Mr. JOHNSON. It is not because of what they might say to someone. Do you understand that distinction?

Mr. DACUS. Yes, I understand that distinction, but——

Mr. JOHNSON. Well, let me ask you this question them. Could a person be prosecuted under this act for expressing hostility to a religious or racial group if the person has not committed a violent crime?

Mr. DACUS. Actually, potentially yes. Potentially, yes. And let me explain why. As was alluded to earlier initially by——

Mr. JOHNSON. We are talking about Federal law, not California law.

Mr. DACUS. Okay. Yes. No, but here is the point. I thought you were asking me in the context of this bill.

Mr. JOHNSON. Well, I am talking about this bill here. That is why we are here.

Mr. DACUS. Yes. In the context of this bill, pursuant to the application of the existing Federal law, the section 18 that was referenced by Mr. Gohmert, the fact is that if you have a scenario where you have, say, a pastor, a clergy or a rabbi who has engaged in——

Mr. JOHNSON. Well, if——

Mr. DACUS. Excuse me. I would like to answer the question. Do you want me to——

Mr. JOHNSON. You are eating up my time.

Mr. DACUS. I do not intend to.

Mr. JOHNSON. If you are going to talk about what they might say versus what someone may do to them physically, then you are pretty much wasting my time.

Mr. DACUS. No, no. Such individuals, though, are potentially carried over to the same kind of prosecution, the same punishments as the original perpetrator pursuant to section 18.

Mr. JOHNSON. Well, again, I was asking about the section that I just pointed you to that talks about violent injury.

I want to ask Mr. Lynch before my time——

Mr. NADLER. The time of the gentleman has expired.

Mr. JOHNSON. It has expired. All right. Thank you.

Mr. NADLER. I now recognize the gentleman from Ohio for 5 minutes.

Mr. CHABOT. Mr. Chairman, I apologize for not being present for this entire hearing because I had several other conflicts on my schedule, things to do at the same time, but it is obviously a very interesting issue that has been dealt with by this Congress over the years.

We have had a number of people that have testified in the past, and rather than go through some of the same questions that have probably been asked, I would just address this to the panel in general.

Could you explain why it ultimately matters, the motivation behind one person harming another? If the damage is done to that person and the person who has carried out that behavior is prosecuted as they should be—when one person harms another, they should be prosecuted, I believe, to the fullest extent of the laws—why does it matter whether the person did it because they dislike the person's religion or they dislike the person's skin color or their sexual orientation or whatever? If they harm the person, they have broken the law, and they ought to be prosecuted for that harm if they are guilty.

Aren't we, to some degree, taking up the government's limited resources in trying to determine the motivation when we could be looking at the facts, determining what harm was done and how to best catch the person And then prosecute them accordingly? You know, why do we need to get into whether the person hated the person or not?

If they harm to the person, they should be prosecuted, I believe, to the fullest extent of the law. And I know there are philosophical disagreements on that.

But I would be happy to just go down the line. Since I only have 5 minutes, and I probably took about 2 minutes, if you could each one take about 30 seconds, that uses up all my time.

And I want to be as fair or as possible to all the panel members. So we will start at this end, if that is okay.

Mr. SHURTLEFF. Thank you, Representative.

Yes, we for hundreds of years of criminal jurisprudence in this country have punished more severely those crimes which are most harmful to the community.

When it comes to a hate crime, there is more than one victim. That is the key, is that when a crime is committed against a person because of who they are, the color of their skin, their race, their sexual orientation, the crime that we have to prove as prosecutors is against not just one individual, but the entire community.

Therefore, the entire community is victimized, making it a more serious crime because there are more victims, therefore requiring a greater punishment. Our duties are to try as law enforcement officials to keep that individual who will do that—and we can prove by the facts—away from those law-abiding citizens for a greater period of time because of the crime they committed.

Mr. LYNCH. I think you put your finger on it. This has been covered a little bit by Congressman Gohmert, and some of the witnesses have made this point, but I think you are right. This is the crux of the matter.

I think the supposition behind hate crimes is that violence against individuals that is rooted in hatred based upon jealousy, greed or lust or whatever and some of these hatreds, these violent offenses should be treated less severely than violence that is rooted in a hatred based upon race, racism or religious hatred or something like that. I do not think there should be a hierarchy of hatred written into our criminal code.

And you are right on your second point, in that unless you have the easy case where you have a guy expressing, you know, his racist thoughts, as he is beating up somebody—that is the easy case—it is not going to involve more investigative or prosecutorial resources when you have witnesses hear that sort of thing.

But if the perpetrator keeps his mouth shut, then investigative resources, if you want to prove a hate-crime motivation, resources then have to be devoted toward proving his motivation. And the question is whether that is a good basis for limited resources. Is it necessary or not?

Mr. CHABOT. I note that the yellow light is already on. So, if you could keep to those 30 seconds, we are still going to go over it.

I would ask unanimous consent for 1 additional minute, Mr. Chairman, for the others.

Mr. NADLER. Without objection.

Mr. CHABOT. Thank you.

But try to stick to the 30 seconds.

Mr. LAWRENCE. I will try not to use any of that extra minute, Mr. Chairman.

It is a very important question, why focus on motivation, and the answer is pretty straightforward. You focus on motivation, as the

criminal law often does, where motivation is directly related to harm.

In the case of bias motivation, what both studies by legal academics and by my colleagues, like Professor McDevitt, have demonstrated, from a sociological point of view, psychological point of view, the harm is worse because of the motivation. I said a little bit earlier that Justice Holmes said even a dog knows the difference being tripped over and being kicked. The intentional crime and the crime because bias motivation is worse and more harmful.

The other thing I will just say quickly is we are not breaking new ground here. The law looks at motivation in many situations. The Supreme Court has upheld the use of racial animus as a characteristic for capital punishment in Barkley against Florida. In all of the civil rights statutes, it is motivation that changes a legal act, firing somebody for no reason whatsoever, into an illegal act, firing them with racial animus.

Mr. RITCHESON. I am not sure how to answer that question.

Mr. DACUS. Okay. I would like to comment.

First off, with regard to intent, intent is applied to the intent to actually commit the crime and do the crime, not the motivation. This is new territory with regards to this whole matter.

I would also like to reference the whole concept that all victims—all victims—all the Davids out there, irrespective of their color, their gender, whatever it may be—all Davids—to sort of paraphrase what was actually mentioned by the Honorable Jackson Lee—are to be treated equal and to be protected.

And I think that that is really the fundamentals that we are talking about, is equal treatment for the victims and equal justice for the victims. That is a civil rights issue that is inherent in this whole question that I think we are overlooking.

Mr. MCDEVITT. And just quickly, I think we have always punished crimes differently by the harm that the crime imposes on the victim. We have always done that.

And what we know about these kinds of hate crimes is that the victims are incredibly vulnerable. I know, as a criminologist, victims can adapt and can figure out ways to make themselves less vulnerable in the future, but if you are attacked because you are Black or you are Asian or you are Latino or somebody thinks you might be gay, you cannot change that, and that will always be with you, and you are always vulnerable as a part of that.

Mr. CHABOT. I thank the whole panel.

Mr. NADLER. The Chair now recognizes for 5 minutes the gentlelady from Texas.

Ms. JACKSON LEE. Again, let me use this time to offer my deepest sympathy to Chairman Scott in the loss in his community of which none of us know the full facts.

Let me also make the point that I think the witnesses will agree that the real hero in the room is David, and we thank him for his appearance here and the young leadership that he has shown.

I want to debunk some of the comments that were made, and the tone I use is not the usual tone that I have when I am provoked, but this is a very serious set of circumstances, and I am gratified that Chairman Conyers now has the real opportunity to move such a vitally important legislative initiative.

But I have sat in this room, I believe, now 12, going on 14 years, and I recall some earlier, less civil discussions of the hate crimes when it was represented by, I am sure, well-intentioned members that there was a possibility that a drunken husband could come home and abused his wife and be charged with a hate crime. Albeit how serious that statement may have been made and the intent behind the, I considered it offensive and, frankly, uncivil.

I also consider comments, albeit as sincere as they might be, to suggest that the attention of the FBI would be distracted because we are in a war on terrorism when everyone knows that the basic collapse of 9/11 was the issue of a sharing of intelligence. Certainly, there may have been some questions of resources, but I frankly am too patriotic, too much in love with America to ever believe that we do not have the resources to fight crime, discrimination, viciousness and hateful acts.

I am disappointed that witnesses here are today would offer such frivolous excuses for suggesting that there are some reasons we should not pass this legislation.

I want to make it very clear that there are three elements to this and one that clearly helped solve a case, unfortunately, that also came from Texas, and that is the James Barrett case, when it was clear that the State-Federal collaboration clearly helped in the investigation of that case. This case now puts in law this collaboration between the Federal and State, and it also works to, if you will, clearly take away this federally protected activity bar.

To the attorney general, which you just, comment, and as you do that, we had Deputy Attorney General Eric Holder who discussed another case in Texas where a jury acquitted three White supremacists of Federal criminal civil rights charges arising from unprovoked assaults upon African-Americans, including one incident in which defendants knocked a man unconscious as he stood near a bus stop. Some of the jurors revealed after the trial that although the assaults were clearly motivated by a racial animus, they had a hard time with the intent to deprive the victims of the right to participate in any federally protected activity.

Can you elaborate on what kind of bar that really poses sometimes for local prosecution?

Mr. SHURTLEFF. Well, indeed, we have great cooperative relationships with our Federal counterparts, and usually it is a situation like this where there are such heinous crimes committed, for example, Internet Crimes Against Children, where there are Federal laws and there are State laws, and every time we work together on a task force, we sit down to staff the case and look at which law, which set of facts, which investigation is ultimately going to keep that person away from harming our children, and I think that is what we want to be able to do in this situation.

Ms. JACKSON LEE. If I might, when we manage to take away the bar of this federally protected activity language that confuses jurors, is that helpful to you?

Mr. SHURTLEFF. Absolutely helpful to us.

Ms. JACKSON LEE. And I thank you for that.

I know my time is short.

Let me also make it clear that as I understand this particular legislation, it does not stop someone from practicing their faith.

Professor Lawrence, my understanding is that this legislation would not prohibit the lawful expression of one's deeply held religious beliefs, people who want to say things like "Homosexuality is sinful," "Homosexuality is an abomination," things that I would not want to say and do not want to hear, but, however, in their religious faith, the homosexuals did not inherit the kingdom.

Is this bill interfering with those rights and privileges?

Mr. LAWRENCE. It certainly does not interfere with those rights to express those views, so long as they are not complicitous in criminal activity. The expression of those views would not be criminalized by this legislation.

Ms. JACKSON LEE. David, as I understand it, these were young people or near teenagers that might have been engaged in this violent crime that was against you.

Mr. RITCHESON. Yes, ma'am.

Ms. JACKSON LEE. And you have heard after the fact that there were not only carvings of the name.

May I have an additional 30 seconds?

We understand that there were epithets thrown at you. You know that we have a bill under your name, David's Law, that would engage with grant money to reach out to young perpetrators of hate. Do you think that is valuable?

Mr. RITCHESON. Yes, ma'am.

Ms. JACKSON LEE. And would that be helpful in high schools and middle schools around the country?

Mr. RITCHESON. Yes, ma'am. That would be.

Ms. JACKSON LEE. And I hope that you will be willing to tell your story, now that you have come to tell us, around America and to help young people understand tolerance. Would you?

Mr. RITCHESON. Yes, ma'am. Absolutely.

Ms. JACKSON LEE. With that, I yield back my time.

Mr. NADLER. I thank gentlelady.

I now recognize the gentlelady from Wisconsin.

Ms. BALDWIN. Thank you very much, Mr. Chairman.

I hail from Wisconsin, and we have discussed already that Wisconsin has a hate crimes law that was tested in *Wisconsin v. Mitchell,* and as a resident of a State with a strong hate crimes law, I feel very strongly about the need to pass this at the Federal level. We hope that a hearing such as the can help us address misinformation that might exist about these legislative approaches, and typically we ask witnesses to respond to the testimony of other witnesses.

Before I do that, I would like actually to ask about a response to one of the statements made by Members in the course of their opening statements. Because one of the statements described a slippery slope related to definitions in this legislation and underlying Federal legislation, specifically referencing the term "sexual orientation."

And I would ask, Dean Moran and Professor McDevitt, if this is a concern that you share, that there is some sort of slippery slope with regard to those definitions.

Mr. LAWRENCE. No, I do not think there is. I think it is always possible to march out a parade of horribles of what might happen

in legislation, but I think we should be dealing with the reality of how law enforcement will proceed in the law like this.

I would also add that particularly with the term "sexual orientation" this is not the first time we will see this in a Federal statute. Is that the first time we will see it in a Federal criminal civil rights statute? We have seen it in the Hate Crimes Reporting Act, and we have seen it in section 994 for enhancement to penalties of Federal crimes.

So there is jurisprudence based on this, and I do not have that concern.

Mr. MCDEVITT. And I agree as well. I think that we can look to the States as a laboratory about how this has been played out, and it has played out across the country where we have not seen any kind of egregious problems associated with prosecutions at the State level. So I think we can look at that and think when we add Federal resources to that, we will be even less likely to make mistakes.

Ms. BALDWIN. When Mr. Lynch was testifying, he indicated or argued that we could potentially even decrease tolerance by encouraging the belief that law enforcement agencies would engage in favoritism because of Federal hate crimes law.

I wonder, Professor McDevitt, if you could address this from the perspective that you announced earlier that really these measures cover all of us, and then I will turn to General Shurtleff about addressing this from the perspective of the top law enforcement officer for Utah.

Mr. MCDEVITT. As I mentioned before, I think that the thing that makes these laws effective is that they are not special laws for social people, but they protect all of us. When you go and you train law enforcement or you speak to victims groups, you do any of that, you can say that whoever is attacked, because the motivation is biased, based on race, religion or other characteristics, they can be prosecuted under this statute, and I think that is hugely important and makes these statutes legitimate.

Ms. BALDWIN. General Shurtleff, do you have any concerns that passage of a Federal hate crimes law would actually decrease tolerance by spreading a belief that law enforcement would engage in favoritism?

Mr. SHURTLEFF. No, Representative, I have not; in fact, quite to the contrary. You know, our responsibility in law enforcement is to fill that number one purpose in establishing justice, and justice means equality, equal access, equal treatment under the law. Our job is to protect everybody regardless of race, religion, ethnicity, sexual orientation to really make real those God-given rights of life, liberty and the pursuit of happiness.

There are those in our communities who do not believe that everybody is equal and will commit a crime against somebody because of who they are. This will give law enforcement the ability to protect everyone equally, because we are all members of our race, we all have a religion, we all have a sexual orientation, we all have a gender. It will give us the chance in law enforcement to protect everybody equally across the board.

Ms. BALDWIN. There have been several references to the Hate Crime Statistics Act, and, of course, this bill, I believe, in section

8, amends that to add some new categories that we would charge our law enforcement with tracking.

Professor McDevitt, could you review the protected classes that are currently covered by the Hate Crime Statistics Act? Let's just start there.

Mr. MCDEVITT. It is race, religion, ethnicity, and we are going to be adding gender and gender identity to the categories that are there, also presently do Sexual Orientation Act, and I did say when the 1990 act passed, it was really important that the FBI was the one that went around the country and trained local law enforcement, but it was a huge drain on their resources. They did it in regional meetings, and local law enforcement benefited from it.

Ms. BALDWIN. How much time remains, Mr. Chairman?

Mr. NADLER. Does the gentlelady request 1 additional minute?

Ms. BALDWIN. I would appreciate 1 additional minute.

Mr. NADLER. Without objection.

Ms. BALDWIN. I cannot see the light from here.

Mr. NADLER. Without objection.

Ms. BALDWIN. I think that the collection of these statistics is incredibly important in making the case, obviously, for broader protections. Currently, gender identity is not one of the protected class is included in that.

Are there other sources of information that you have access to or knowledge about or expertise on with regard to the prevalence of hate crimes, bias crimes with regard to gender identity?

Mr. MCDEVITT. We have some measures that come from advocacy groups and will talk about individuals in those groups having been victimized in the area of 30 to 40 percent of individuals who are transgender or have gender identification issues, but those data are all tainted by the fact they are collected by advocacy groups. If the FBI were to collect them, then we would be in a much better place of having more reliable data.

Ms. BALDWIN. Thank you.

I yield back.

Mr. NADLER. I thank the gentlelady.

All questioning is concluded.

I recognize the gentleman from Texas.

Mr. GOHMERT. Thank you, Mr. Chairman.

Our Ranking Member for this Subcommittee, Randy Forbes, is at Virginia Tech with the Virginia delegation, and I would ask unanimous consent to submit his written statement in as part of the record of this hearing.

Mr. NADLER. Without objection.

[The prepared statement of Mr. Forbes follows:]

PREPARED STATEMENT OF THE HONORABLE J. RANDY FORBES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Statement of Ranking Member Randy Forbes
Subcommittee on Crime, Terrorism and Homeland Security

Legislative Hearing on H.R. 1592, "The Local Law Enforcement Hate Crimes Prevention Act"

April 17, 2007

Thank you, Chairman Scott. I appreciate your holding this legislative hearing on H.R. 1592, "The Local Law Enforcement Hate Crimes Prevention Act."

We all deplore bias-related violent crimes. In the past few weeks, we have seen how hate speech can infect and polarize our nation. Even more than hate-filled speech, violent crimes committed in the name of hatred of a group are insidiously harmful, and should be forcefully prosecuted.

The Federal government can play a role in reducing the incidence of these crimes. In my view, the bill before us today raises significant questions and may, in fact, be counter-productive to any attempt to address the problem of hate crimes.

First, H.R. 1592 would expand the federal government into criminal prosecutions of crimes typically handled by the States. There is

no evidence to justify such an expansion, nor is there any evidence to suggest that States are not fully prosecuting violent crimes that involve "hate."

In fact, the most notorious hate crime prosecutions in the last 20 years involving the murder of James Byrd in Texas and the murder of Matthew Shepard in Wyoming were conducted by the States, and no one has ever argued that the States did not secure justice for these brutal crimes. In the absence of evidence that States are unable to prosecute or decline to prosecute hate crimes, there is no reason for the federal government to assert jurisdiction or for the diversion of federal resources to such investigations and prosecutions.

Second, according to FBI data, the incidence of hate crimes has actually declined over the last ten years. In 1995, 7,947 hate crime incidents were reported. Statistics for the last four years, 2002 through 2005, show a decline in the number of hate crimes reported. In 2005, for example, 7,163 hate crimes were reported.

The FBI data show that "hate-crimes" murders make up only one-tenth of 1% of the over 15,000 murders that occur in the United States

every year. Why would we focus on legislation that ignores 99.9% of the murders in this country – especially when States already are prosecuting hate-motivated murders?

Even in the 2006 National Crime Victimization Survey, which focused on victim-reported claims of hate crimes from 2000 to 2003, the report concluded that only an estimated 3 percent of all violent crimes were reported by victims as hate crimes. Of these, law enforcement only validated 8 percent of the claimed hate crimes. In almost half of the hate crimes, the victim was threatened verbally or assaulted by an offender who did not have a weapon or did not cause any physical injury to the victim.

Third, the bill raises significant constitutional concerns by relying on the Commerce Clause, and the Thirteenth, Fourteenth and Fifteenth Amendments as authority for such an expansion of federal authority.

The Supreme Court, in *United States v. Morrison*, 529 U.S. 598 (2000), struck down a prohibition on gender-motivated violence, and specifically ruled that Congress has no power under the commerce clause or the Fourteenth Amendment over "non-economic, violent

criminal conduct" that does not cross state lines. The Court concluded that upholding the Violence Against Women Act provision would open the door to a federalization of virtually all serious crimes as well as family law and other areas traditionally reserved for the states.

The proposed legislation is not authorized under the Fourteenth and Fifteenth Amendments. The Fifteenth Amendment forbids the federal government or a state from denying or abridging the right to vote on the basis of an individual's race, color or pervious condition of servitude. The Fourteenth Amendment prohibits the states from denying equal protection of the law, due process or the privileges and immunities of US citizenship. Both of these Amendments extend only to state action and do not encompass the actions of private persons, such as violent crimes committed based on bias or prejudice.

The Thirteenth Amendment, and specifically Section 2, stands on different footing. The Amendment reaches private conduct such as individual criminal conduct, but Congress would have to cite evidence, beyond mere claims, that hate crimes against certain groups constitute a "badge and incidence" of slavery. Vague assertions that some hate

crimes might be linked to vestiges, badges, or incidents of slavery or segregation would not be enough.

Balanced against the remedial purposes of the Thirteenth Amendment are concerns that such legislation would have a chilling effect on First Amendment rights by injecting criminal investigations and prosecutions into areas traditionally reserved for protected activity. For example, in prosecuting an individual for a hate crime, it may be necessary to seek testimony relating to the offender's thought process, leading to his motivation to attack a person out of hatred of a particular religious or political group. So, for example, members of an organization or a religious group may be called as witnesses to provide testimony as to ideas that may have influenced the defendant's thoughts or motivation for his crimes. Such groups or religious organizations may be chilled from expressing their ideas out of fear from involvement in the criminal process.

This concern underscores what I consider to be a major problem with the bill. Hate-crimes laws improperly focus on personal beliefs, rather than actual conduct. All hate crimes laws inevitably degenerate

into an intrusive investigation into a person's beliefs and thought processes. Ordinarily, criminal law does not concern itself with motive (why a person acted), but rather with intent (whether the perpetrator intended or knew that he would cause harm). If someone intended to cause harm, no motive makes that conduct more or less culpable. I am concerned about the impact, the slippery slope that may develop, as we start to treat murders differently depending on the thoughts of the offender, or the race, sex, or other immutable characteristics of the victim.

I want to thank you again Chairman Scott for holding this important hearing. I look forward to continuing to work together with you on important issues before this Subcommittee.

I look forward to hearing from the witnesses and hope that they address the issues I have raised.

Ms. JACKSON LEE. Mr. Chairman, I would like to ask unanimous consent to put into the record, I think, a very tributing statement on David. The title is "Moving On and Trying to Shed the Victim Label" dated April 17, 2007 in the Houston Chronicle.

Mr. NADLER. Without objection.

[The information referred to follows:]

Houston Chronicle (KRT)

April 17, 2007

Moving on, and trying to shed 'victim' label: Teen testifying in D.C. for stricter hate crimes laws after brutal attack
Paige Hewitt and Bill Murphy
Houston Chronicle

Apr. 17--David Ritcheson had been a running back on the Klein Collins High School football team. He was homecoming prince as a freshman and had a girlfriend. He "hung out with the good crowd," he says, and had every reason to look forward to returning last fall.

But once classes resumed, Ritcheson was overwhelmed by the looks he got everywhere he went -- in the halls, in the cafeteria, in classrooms.

The looks all said the same thing: You're a victim, how do you deal with it? Everybody knew what had happened to him, and the attack, he says, "was just so degrading."

In a case that drew national attention, Ritcheson, a Mexican-American, was severely assaulted last April 23 by two youths while partying in Spring. One of the attackers, a skinhead named David Tuck, yelled ethnic slurs and kicked a pipe up his rectum, severely damaging his internal organs and leaving Ritcheson in the hospital for three months and eight days -- almost all of it in critical care.

In an hour-long interview at his home with his parents on Monday, Ritcheson agreed to be photographed and have his name made public. He reflected on his life before the attack, described the lengthy recovery that followed and looked forward to wresting something positive from the experience.

"How hasn't it changed me?" he asked, summing up the experience.

Today, Ritcheson will be in Washington, D.C., to testify before a congressional committee about why he feels federal hate crime laws need to be expanded. As much as he doesn't want to be a "poster child," Ritcheson is convinced he can do some good.

Now 18, Ritcheson said he doesn't remember anything about the attack -- not the punches, not the kicks to the head, not the 17 cigarette burns that still scar his body, not the bleach poured on his face and body and not the assault with a pipe taken from a patio umbrella.

He does remember riding a bus to school on April 21. He remembers taking a TAKS test. And then he remembers waking up with his arms strapped down, a tube in his throat, and feeling he was nearly blinded by bright lights above him.

"I thought I had gone crazy," he said. "I thought I was in an institution."

Court testimony and laboratory and law enforcement reports filled in some of the gaps. Tuck and Keith Turner met up with Ritcheson and his friend Gus Sons at a crawfish festival in Spring. They later all went to Sons' home.

The violence that followed was fueled by hard liquor, marijuana and Xanax, an anti-anxiety drug.

Tuck, 19, and Keith Turner, 18, both of Spring, eventually were convicted of aggravated sexual assault for attacking Ritcheson in the backyard. Tuck was given a life sentence, Turner 90 years.

Sons never called the police and didn't prevent the attack. Following the beating, Ritcheson lay in the backyard, naked, for hours until Sons' mother called police much later in the morning.

Gus Sons testified at both Tuck and Turner's trials. During a break in one, Sons apologized to Ritcheson. The two have had no contact since.

"He could have done more," said Ritcheson, "he could have done less."

Ritcheson and Sons had become friends about a month earlier at Highpoint North, an alternative school where Ritcheson said he had been sent for fighting, and a place, he said, he didn't fit in.

Ritcheson believes he met Tuck and Turner for the first time the night of the attack. But he'd heard of Tuck and knew he had a reputation for violence. He also sees what he had in common with Tuck and Turner -- like him, they seemed to be in search of a good time.

Ritcheson said he deeply regrets letting himself get so inebriated that he failed to pick up on the brewing trouble, and that he was in no shape to defend himself or run away.

Both Tuck and Turner were filled with such hatred that they might have attacked somebody else as viciously, said Ritcheson, whose body bears the scars from their attempt to carve a swastika into his chest.

The FBI had no grounds to investigate the attack because it occurred in a private yard. Under federal law, perpetrators can be charged with a hate crime only if the event occurs in an area of public access.

Ritcheson will testify in support of a bill that would allow people to be charged with a hate crime even if the incident happens at a home or other private property.

The law is needed, he said, because there will be other, similar attacks.

News coverage, with its humiliating references to the "pipe assault victim," he said, "tested me mor

"I shouldn't care what people think," he said. "But it's like everyone knows I'm 'the kid.' I don't want to be a standout because of what happened."

Ritcheson has declined psychological counseling, relying on his parents and friends. He copes with the past, he said, "by not thinking about it."

He knows the attack changed him fundamentally but says he has overcome the worst of it.

"I'm reminded every day of how lucky I am," he said.

Ritcheson hopes to graduate from Klein Collins and begin attending Blinn College or Austin Community School in about a year. He hopes to transfer to Texas A&M and study psychology or business.

After some 30 surgeries and post-surgical procedures, he still has four or more operations ahead.

Not all the scars are physical. While recuperating from his injuries for three months at Memorial Hermann-The Texas Medical Center, he had nightmares; in one, he fell off a building.

A few weeks ago, he had another in which a child molester tried to lure a child into a van and an elderly couple nearby stood watching, doing nothing to intervene.

paige.hewitt@chron.com bill.murphy@chron.com

Mr. NADLER. Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so that your answers may be part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

I wish to thank the witnesses for their participation and their helping the House in this manner.

I want to thank the Members.

With that, the hearing is adjourned.

[Whereupon, at 4:03 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

I

110TH CONGRESS
1ST SESSION

H. R. 1592

To provide Federal assistance to States, local jurisdictions, and Indian tribes to prosecute hate crimes, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 20, 2007

Mr. CONYERS (for himself, Mr. KIRK, Mr. FRANK of Massachusetts, Mr. SHAYS, Ms. BALDWIN, Ms. ROS-LEHTINEN, Mr. NADLER, Mrs. BONO, Mr. ABERCROMBIE, Mr. ACKERMAN, Mr. ALLEN, Mr. ANDREWS, Mr. ARCURI, Mr. BACA, Mr. BAIRD, Mr. BECERRA, Ms. BERKLEY, Mr. BERMAN, Mrs. BIGGERT, Mr. BISHOP of New York, Mr. BLUMENAUER, Ms. BORDALLO, Mr. BOSWELL, Mr. BRADY of Pennsylvania, Mr. BRALEY of Iowa, Ms. CORRINE BROWN of Florida, Mrs. CAPPS, Mr. CAPUANO, Mr. CARNAHAN, Ms. CARSON, Mr. CASTLE, Mr. COHEN, Mr. COSTA, Mr. COURTNEY, Mr. CROWLEY, Mr. CUMMINGS, Mr. DAVIS of Illinois, Mrs. DAVIS of California, Mr. DEFAZIO, Ms. DEGETTE, Mr. DELAHUNT, Ms. DELAURO, Mr. DINGELL, Mr. DOGGETT, Mr. DOYLE, Mr. ELLISON, Mr. EMANUEL, Mr. ENGEL, Mr. FARR, Mr. FATTAH, Mr. FILNER, Mr. GERLACH, Ms. GIFFORDS, Mr. GONZALEZ, Mr. GENE GREEN of Texas, Mr. GRIJALVA, Mr. HASTINGS of Florida, Mr. HIGGINS, Mr. HINCHEY, Ms. HIRONO, Mr. HODES, Mr. HOLT, Mr. HONDA, Ms. HOOLEY, Mr. INSLEE, Mr. ISRAEL, Ms. JACKSON-LEE of Texas, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. KAGEN, Mr. KENNEDY, Mr. KILDEE, Mr. KIND, Mr. KLEIN of Florida, Mr. KUCINICH, Mr. KUHL of New York, Mr. LANGEVIN, Mr. LARSON of Connecticut, Ms. LEE, Mr. LEVIN, Mr. LEWIS of Georgia, Mr. LOEBSACK, Ms. ZOE LOFGREN of California, Mrs. LOWEY, Mr. LYNCH, Mrs. MALONEY of New York, Mr. MARKEY, Ms. MATSUI, Ms. MCCOLLUM of Minnesota, Mr. MCDERMOTT, Mr. MCGOVERN, Mr. MCNULTY, Mr. MEEHAN, Mr. MICHAUD, Mr. MILLER of North Carolina, Mr. GEORGE MILLER of California, Ms. MOORE of Wisconsin, Mr. MOORE of Kansas, Mr. MORAN of Virginia, Mr. MURPHY of Connecticut, Mr. PATRICK J. MURPHY of Pennsylvania, Mrs. NAPOLITANO, Ms. NORTON, Mr. OLVER, Mr. PALLONE, Mr. PASCRELL, Mr. PASTOR, Mr. PAYNE, Mr. ROTHMAN, Ms. ROYBAL-ALLARD, Ms. LINDA T. SÁNCHEZ of California, Ms. SCHAKOWSKY, Mr. SCHIFF, Ms. SCHWARTZ, Mr. SCOTT of Virginia, Mr. SERRANO, Ms. SHEA-PORTER, Mr. SHERMAN, Mr. SIRES, Mr. SKELTON, Ms. SLAUGHTER, Mr. SMITH of Washington, Mr. STARK, Ms. SUTTON, Mrs. TAUSCHER, Mr. THOMPSON of California, Mr. TIERNEY, Mrs. JONES of Ohio, Mr. UDALL of Colorado,

Mr. UDALL of New Mexico, Mr. VAN HOLLEN, Ms. WASSERMAN SCHULTZ, Ms. WATSON, Mr. WAXMAN, Mr. WEINER, Mr. WEXLER, Ms. WOOLSEY, Mr. WU, and Mr. WYNN) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide Federal assistance to States, local jurisdictions, and Indian tribes to prosecute hate crimes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Local Law Enforcement Hate Crimes Prevention Act of 2007".

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) The incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem.

(2) Such violence disrupts the tranquility and safety of communities and is deeply divisive.

(3) State and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes in the United

States, including violent crimes motivated by bias. These authorities can carry out their responsibilities more effectively with greater Federal assistance.

(4) Existing Federal law is inadequate to address this problem.

(5) A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.

(6) Such violence substantially affects interstate commerce in many ways, including the following:

(A) The movement of members of targeted groups is impeded, and members of such groups are forced to move across State lines to escape the incidence or risk of such violence.

(B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity.

(C) Perpetrators cross State lines to commit such violence.

(D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence.

(E) Such violence is committed using articles that have traveled in interstate commerce.

(7) For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

(8) Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct "races". Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were re-

garded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.

(9) Federal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes.

(10) The problem of crimes motivated by bias is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States, local jurisdictions, and Indian tribes.

SEC. 3. DEFINITION OF HATE CRIME.

In this Act—

(1) the term "crime of violence" has the meaning given that term in section 16, title 18, United States Code;

(2) the term "hate crime" has the meaning given such term in section 280003(a) of the Violent Crime Control and Law Enforcement Act of 1994 (28 U.S.C. 994 note); and

(3) the term "local" means a county, city, town, township, parish, village, or other general purpose political subdivision of a State.

SEC. 4. SUPPORT FOR CRIMINAL INVESTIGATIONS AND PROSECUTIONS BY STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT OFFICIALS.

(a) ASSISTANCE OTHER THAN FINANCIAL ASSISTANCE.—

(1) IN GENERAL.—At the request of State, local, or Tribal law enforcement agency, the Attorney General may provide technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution of any crime that—

(A) constitutes a crime of violence;

(B) constitutes a felony under the State, local, or Tribal laws; and

(C) is motivated by prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim, or is a violation of the State, local, or Tribal hate crime laws.

(2) PRIORITY.—In providing assistance under paragraph (1), the Attorney General shall give priority to crimes committed by offenders who have committed crimes in more than one State and to rural jurisdictions that have difficulty covering the extraordinary expenses relating to the investigation or prosecution of the crime.

(b) GRANTS.—

(1) IN GENERAL.—The Attorney General may award grants to State, local, and Indian law enforcement agencies for extraordinary expenses associated with the investigation and prosecution of hate crimes.

(2) OFFICE OF JUSTICE PROGRAMS.—In implementing the grant program under this subsection, the Office of Justice Programs shall work closely with grantees to ensure that the concerns and needs of all affected parties, including community groups and schools, colleges, and universities, are addressed through the local infrastructure developed under the grants.

(3) APPLICATION.—

(A) IN GENERAL.—Each State, local, and Indian law enforcement agency that desires a grant under this subsection shall submit an application to the Attorney General at such time, in such manner, and accompanied by or containing such information as the Attorney General shall reasonably require.

(B) DATE FOR SUBMISSION.—Applications submitted pursuant to subparagraph (A) shall be submitted during the 60-day period begin-

ning on a date that the Attorney General shall prescribe.

(C) REQUIREMENTS.—A State, local, and Indian law enforcement agency applying for a grant under this subsection shall—

(i) describe the extraordinary purposes for which the grant is needed;

(ii) certify that the State, local government, or Indian tribe lacks the resources necessary to investigate or prosecute the hate crime;

(iii) demonstrate that, in developing a plan to implement the grant, the State, local, and Indian law enforcement agency has consulted and coordinated with nonprofit, nongovernmental victim services programs that have experience in providing services to victims of hate crimes; and

(iv) certify that any Federal funds received under this subsection will be used to supplement, not supplant, non-Federal funds that would otherwise be available for activities funded under this subsection.

(4) DEADLINE.—An application for a grant under this subsection shall be approved or denied by

the Attorney General not later than 30 business days after the date on which the Attorney General receives the application.

(5) GRANT AMOUNT.—A grant under this subsection shall not exceed $100,000 for any single jurisdiction in any 1-year period.

(6) REPORT.—Not later than December 31, 2008, the Attorney General shall submit to Congress a report describing the applications submitted for grants under this subsection, the award of such grants, and the purposes for which the grant amounts were expended.

(7) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection $5,000,000 for each of fiscal years 2008 and 2009.

SEC. 5. GRANT PROGRAM.

(a) AUTHORITY TO AWARD GRANTS.—The Office of Justice Programs of the Department of Justice may award grants, in accordance with such regulations as the Attorney General may prescribe, to State, local, or Tribal programs designed to combat hate crimes committed by juveniles, including programs to train local law enforcement officers in identifying, investigating, prosecuting, and preventing hate crimes.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out this section.

SEC. 6. AUTHORIZATION FOR ADDITIONAL PERSONNEL TO ASSIST STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT.

There are authorized to be appropriated to the Department of the Treasury and the Department of Justice, including the Community Relations Service, for fiscal years 2008, 2009, and 2010 such sums as are necessary to increase the number of personnel to prevent and respond to alleged violations of section 249 of title 18, United States Code, as added by section 7 of this Act.

SEC. 7. PROHIBITION OF CERTAIN HATE CRIME ACTS.

(a) IN GENERAL.—Chapter 13 of title 18, United States Code, is amended by adding at the end the following:

"§ 249. Hate crime acts

"(a) IN GENERAL.—

"(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN.—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to

any person, because of the actual or perceived race, color, religion, or national origin of any person—

"(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

"(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

"(i) death results from the offense; or

"(ii) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

"(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, GENDER IDENTITY, OR DISABILITY.—

"(A) IN GENERAL.—Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B), willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gen-

der, sexual orientation, gender identity or disability of any person—

"(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

"(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

"(I) death results from the offense; or

"(II) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

"(B) CIRCUMSTANCES DESCRIBED.—For purposes of subparagraph (A), the circumstances described in this subparagraph are that—

"(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—

"(I) across a State line or national border; or

"(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

"(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

"(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

"(iv) the conduct described in subparagraph (A)—

"(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

"(II) otherwise affects interstate or foreign commerce.

"(b) CERTIFICATION REQUIREMENT.—No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, the Deputy At-

torney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that—

"(1) such certifying individual has reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person was a motivating factor underlying the alleged conduct of the defendant; and

"(2) such certifying individual has consulted with State or local law enforcement officials regarding the prosecution and determined that—

"(A) the State does not have jurisdiction or does not intend to exercise jurisdiction;

"(B) the State has requested that the Federal Government assume jurisdiction;

"(C) the State does not object to the Federal Government assuming jurisdiction; or

"(D) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence.

"(c) DEFINITIONS.—In this section—

"(1) the term 'explosive or incendiary device' has the meaning given such term in section 232 of this title;

"(2) the term 'firearm' has the meaning given such term in section 921(a) of this title; and

"(3) the term 'gender identity' for the purposes of this chapter means actual or perceived gender-related characteristics.

"(d) RULE OF EVIDENCE.—In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The analysis for chapter 13 of title 18, United States Code, is amended by adding at the end the following:

"249. Hate crime acts.".

SEC. 8. STATISTICS.

(a) IN GENERAL.—Subsection (b)(1) of the first section of the Hate Crimes Statistics Act (28 U.S.C. 534 note) is amended by inserting "gender and gender identity," after "race,".

(b) DATA.—Subsection (b)(5) of the first section of the Hate Crimes Statistics Act (28 U.S.C. 534 note) is

amended by inserting ", including data about crimes committed by, and crimes directed against, juveniles" after "data acquired under this section".

SEC. 9. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

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PREPARED STATEMENT OF CHRISTOPHER E. ANDERS, LEGISLATIVE COUNSEL, THE AMERICAN CIVIL LIBERTIES UNION

I. INTRODUCTION

The American Civil Liberties Union respectfully submits this statement to strongly urge the Subcommittee on Crime—and the full House of Representatives—to pass the Local Law Enforcement Hate Crimes Prevention Act.

We are pleased that the sponsors of the legislation are once again including in the legislation an important provision that ensures that the bill will not chill constitutionally protected speech. Specifically, the bill will include a specific provision excluding evidence of speech that is unrelated to the crime. As a result, the ACLU is strongly urging support for this bill expanding the federal criminal civil rights statutes.

The ACLU believes that the Congress can and should expand federal jurisdiction to prosecute criminal civil rights violations when state and local governments are unwilling or unable to prosecute. At the same time, we also believe that these prosecutions should not include evidence of mere abstract beliefs or mere membership in an organization from becoming a basis for such prosecutions. The hate crimes bill accomplishes these goals by providing a stronger federal response to criminal civil rights violations, but tempering it with clear protections for free speech.

II. THE PERSISTENT PROBLEM OF CRIMINAL CIVIL RIGHTS VIOLATIONS

The ACLU supports providing remedies against invidious discrimination and urges that discrimination by private persons be made illegal when it excludes persons from access to fundamental rights or from the opportunity to participate in the political or social life of the community. The serious problem of crime directed at members of society because of their race, color, religion, gender, national origin, sexual orientation, gender identity, or disability merits legislative action.

Such action is particularly timely as a response to the rising tide of violence directed at people because of such characteristics. Those crimes convey a constitutionally unprotected threat against the peaceable enjoyment of public places to members of the targeted group.

Pursuant to the Hate Crime Statistics Act, the Federal Bureau of Investigation annually collects and reports statistics on the number of bias-related criminal incidents reported by local and state law enforcement officials. For 2003, based on reports from state and local law enforcement agencies, the FBI reported 7,489 incidents covered by the Act. 3,844 of those incidents were related to race, 1,343 to religion, 1,239 to sexual orientation, 1,026 to ethnicity or national origin, 33 to disability, and four to multiple categories.

Existing federal law does not provide any separate offense for violent acts based on race, color, national origin, or religion, unless the defendant intended to interfere with the victim's participation in certain enumerated activities. 18 U.S.C.A. § 245(b)(2). During hearings in the Senate and House of Representatives, advocates for racial, ethnic, and religious minorities presented substantial evidence of the problems resulting from the inability of the federal government to prosecute crimes based on race, color, national origin, or religion without any tie to an enumerated activity. Those cases include violent crimes based on a protected class, which state or local officials either inadequately investigated or declined to prosecute.

In addition, existing federal law does not provide any separate offense whatsoever for violent acts based on sexual orientation, gender, gender identity, or disability. The exclusion of sexual orientation, gender, gender identity, and disability from section 245 of the criminal code can have bizarre results. For example, in an appeal by a person convicted of killing an African-American gay man, the defendant argued that "the evidence established, if anything, that he beat [the victim] because he believed him to be a homosexual and not because he was black." United States v. Bledsoe, 728 F.2d 1094, 1098 (8th Cir. 1984), cert. denied, 469 U.S. 838 (1984). Among the evidence that the court cited in affirming the conviction because of violence based on race, was testimony that the defendant killed the African-American gay victim, but allowed a white gay man to escape. Id. at 1095, 1098. Striking or killing a person solely because of that person's sexual orientation would not have resulted in a conviction under that statute.

In addition to the highly publicized accounts of the deaths of Matthew Shepard and Billy Jack Gaither, other reports of violence because of a person's sexual orientation or gender identity include:

- An account by the Human Rights Campaign of "[a] lesbian security guard, 22, [who] was assigned to work a holiday shift with a guard from a temporary

employment service. He propositioned her repeatedly. Finally, she told him she was a lesbian. Issuing anti-lesbian slurs, he raped her."

- A report by Mark Weinress, during an American Psychological Association briefing on hate crimes, of his beating by two men who yelled "we kill faggots" and "die faggots" at the victim and his partner from the defendants' truck, chased the victims on foot while shouting "death to faggots," and beat the victims with a billy club while responding "we kill faggots" when a bystander asked what the defendants were doing.
- A report by the National Gay and Lesbian Task Force of a letter from a person who wrote that she "was gang-raped for being a lesbian. Four men beat me, spat on me, urinated on me, and raped me.. . . When I reported the incident to Fresno police, they were sympathetic until they learned I was homosexual. They closed their book, and said, 'Well, you were asking for it.'"
- An article in the Washington Post about five Marines who left the Marine Barracks on Capitol Hill to throw a tear gas canister into a nearby gay bar. Several persons were treated for nausea and other gas-related symptoms.

The problem of crimes based on gender is also persistent. For example, two women cadets at the Citadel, a military school that had only recently opened its doors to female students, were singled out and "hazed" by male cadets who did not believe that women had a right to be at the school. Male cadets allegedly sprayed the two women with nail polish remover and then set their clothes ablaze, not once, but three times within a two month period. One male cadet also threatened one of the two women by saying that he would cut her "heart out" if he ever saw her alone off campus.

Federal legislation addressing such criminal civil rights violations is necessary because state and local law enforcement officers are sometimes unwilling or unable to prosecute those crimes because of either inadequate resources or their own bias against the victim. The prospect of such failure to provide equal protection of the laws justifies federal jurisdiction.

For example, state and local law enforcement officials have often been hostile to the needs of gay men and lesbians. The fear of state and local police—which many gay men and lesbians share with members of other minorities—is not unwarranted. For example, until recently, the Maryland state police department refused to employ gay men or lesbians as state police officers. In addition, only blocks from the Capitol a few years ago, a District of Columbia police lieutenant who headed the police unit that investigates extortion cases was arrested by the FBI for attempting to extort $10,000 from a man seen leaving a gay bar. Police officers referred to the practice as "fairy shaking." The problem is widespread. In fact, the National Coalition of Anti-Violence Programs reports several hundred anti-gay incidents allegedly committed by state and local law enforcement officers annually. The federal government clearly has an enforcement role when state and local governments fail to provide equal protection of the laws.

III. THE NEW BILL PROVIDES STRONG PROTECTION OF FREE SPEECH

The ACLU has a long record of support for stronger protection of both free speech and civil rights. Those positions are not inconsistent. In fact, vigilant protection of free speech rights historically has opened the doors to effective advocacy for expanded civil rights protections.

Fourteen years ago, the ACLU submitted a brief to the Supreme Court urging the Court to uphold a Wisconsin hate crime sentencing enhancement statute as constitutional. However, the ACLU also asked the Court "to set forth a clear set of rules governing the use of such statutes in the future." The ACLU warned the Court that "if the state is not able to prove that a defendant's speech is linked to specific criminal behavior, the chances increase that the state's hate crime prosecution is politically inspired." The evidentiary provision in the House bill will help avoid that harm.

The ACLU appreciates the sponsors' inclusion of the evidentiary provision that prevents the hate crimes legislation from having any potentially chilling effect on constitutionally protected speech. The evidentiary subsection in the bill provides that:

> **Evidence of expression or association of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing the impeachment of a witness.**

This provision will reduce or eliminate the possibility that the federal government could obtain a criminal conviction on the basis of evidence of speech that had no role in the chain of events that led to any alleged violent act proscribed by the statute.

This provision in the House bill almost exactly copies a paragraph in the Washington State hate crimes statute. Wash. Rev. Code § 9A.36.080(4). This Washington State language is not new; the paragraph was added to the Washington State statute as part of an amendment in 1993. The ACLU has conferred with litigators involved in hate crimes prevention in Washington State. They report no complaints that the provision inappropriately impedes prosecutions.

On its face, the hate crimes bill punishes only the conduct of intentionally selecting another person for violence because of that person's race, color, national origin, religion, gender, sexual orientation, gender identity, or disability. The prosecution must prove the conduct of intentional selection of the victim. Thus, the hate crimes bill, like the present principal criminal civil rights statute, 18 U.S.C. § 245 ("section 245"), punishes discrimination (an act), not bigotry (a belief).

The federal government usually proves the intentional selection element of section 245 prosecutions by properly introducing ample evidence related to the chain of events. For example, in a section 245 prosecution based on race, a federal court of appeals found that the prosecution met its burden of proving that the defendant attacked the victim because of his race by introducing admissions that the defendant stated that "he had once killed a nigger queen," that he attacked the victim "[b]ecause he was a black fag," and by introducing evidence that the defendant allowed a white gay man to escape further attack, but relentlessly pursued the African-American gay victim. Bledsoe, 728 F.2d at 1098.

Although the Justice Department has argued that it usually avoids attempting to introduce evidence proving nothing more than that a person holds racist or other bigoted views, it has at least occasionally introduced such evidence. In at least one decision, a federal court of appeals expressly found admissible such evidence that was wholly unrelated to the chain of events that resulted in the violent act. United States v. Dunnaway, 88 F.3d 617 (8th Cir. 1996). The court upheld the admissibility of a tattoo of a skinhead group on the inside lip of the defendant because "[t]he crime in this [section 245] case involved elements of racial hatred." Id. at 618. The tattoo was admissible even in the absence of any evidence in the decision linking the skinhead group to the violent act.

The decision admitting that evidence of a tattoo confirmed our concerns expressed in the ACLU's brief filed with the Supreme Court in support of the Wisconsin hate crimes penalty enhancement statute. In asking for guidance from the Court on the applicability of such statutes, the ACLU stated its concern that evidence of speech should not be relevant unless "the government proves that [the evidence] is directly related to the underlying crime and probative of the defendant's discriminatory intent." The ACLU brief urged that, "[a]t a minimum, any speech or association that is not contemporaneous with the crime must be part of the chain of events that led to the crime. Generalized evidence concerning the defendant's racial views is not sufficient to meet this test."

The evidentiary provision in the House hate crimes bill is important because, without it, we could see more evidence of unrelated speech admitted in hate crime prosecutions. Many of the arguments made in favor of hate crime legislation today are very different than the arguments made in favor of enacting section 245 37 years ago. At that time, the focus was on giving the federal government jurisdiction to prosecute numerous murders of African-Americans, including civil rights workers, which had gone unpunished by state and local prosecutors. The intent was to have a federal backstop to state and local law enforcement.

The problem today is that there is an increasing focus on "combating hate," fighting "hate groups," and identifying alleged perpetrators by their membership in such groups—even in the absence of any link between membership in the group and the violent act. Those arguments are very different from the arguments made in support of section 245 when it passed as an important part of the historic Civil Rights Act of 1968.

The evidentiary provision removes the danger that—after years of debate focused on combating "hate"—courts, litigants, and jurors applying a federal hate crime statute could be more likely to believe that speech-related evidence that is unrelated to the chain of events leading to a violent act is a proper basis for proving the intentional selection element of the offense. The provision will stop the temptation for prosecutors to focus on proving the selection element by showing "guilt by association" with groups whose bigoted views we may all find repugnant, but which may have had no role in committing the violent act. We should add that evidence of association could also just as easily focus on many groups representing the very persons

that the hate crimes bill should protect.[1] The evidentiary provision in the House bill precludes all such evidence from being used to prove the crime, unless it specifically related to the violent offense.

The evidentiary provision in the House hate crimes bill is not overly expansive. The provision will bar only evidence that had no specific relationship to the underlying violent offense. It will have no effect on the admissibility of evidence of speech that bears a specific relationship to the underlying crime—or evidence used to impeach a witness. Thus, the proposal will not bar all expressions or associations of the accused. It is a prophylactic provision that is precisely tailored to protect against the chilling of constitutionally protected free speech.

IV. CONCLUSION

For the foregoing reasons, the ACLU strongly urges the House to pass this properly drafted legislation to expand federal jurisdiction to address the continuing problem of an inadequate state and local response to criminal civil rights violations, but without affecting any protected speech. Specifically, the ACLU urges the House to take prompt action in passing the Local Law Enforcement Hate Crimes Prevention Act of 2007. The ACLU appreciates this opportunity to present our concerns.

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[1] For example, many of the principal First Amendment association decisions arose from challenges to governmental investigations of civil rights and civil liberties organizations. *See, e.g., Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1962) (holding that the NAACP could refuse to disclose its membership list to a state legislature investigating alleged Communist infiltration of civil rights groups); *Bates v. City of Little Rock,* 361 U.S. 516 (1960) (reversing a conviction of NAACP officials who refused to comply with local ordinances requiring disclosure of membership lists); *NAACP v. State of Alabama,* 357 U.S. 449 (1958) (holding as unconstitutional a judgment of contempt and fine on the NAACP for failure to produce its membership lists); *New Jersey Citizen Action v. Edison Township,* 797 F.2d 1250 (3rd Cir. 1986) (refusing to require the fingerprinting of door-to-door canvassers for a consumer rights group), *cert. denied, sub nom. Piscataway v. New Jersey Citizen Action,* 479 U.S. 1103 (1987); *Familias Unidas v. Briscoe,* 619 F.2d 391 (5th Cir. 1980) (refusing a request to compel the disclosure of the membership list of a public school reform group); *Committee in Solidarity with the People of El Salvador v. Sessions,* 705 F.Supp. 25 (D.D.C. 1989) (denying a request for preliminary injunction against FBI's dissemination of information collected on foreign policy group); *Alliance to End Repression v. City of Chicago,* 627 F.Supp. 1044 (1985) (police infiltrated and photographed activities of a civil liberties group and an anti-war group).

ATTACHMENT

April 9, 2007

RE: Local Law Enforcement Hate Crimes Prevention Act

Dear Representative:

The American Civil Liberties Union strongly urges you to cosponsor the Local Law Enforcement Hate Crimes Prevention Act of 2007. We are pleased that House Judiciary Committee Chairman John Conyers will once again include in the legislation an important provision that ensures that hate crimes legislation will not chill constitutionally protected speech. Specifically, the bill will include a specific provision excluding evidence of speech that is unrelated to the crime. As a result, the ACLU is strongly urging support for this bill expanding the federal criminal civil rights statutes.

The ACLU believes that the Congress can and should expand federal jurisdiction to prosecute criminal civil rights violations when state and local governments are unwilling or unable to prosecute. At the same time, we also believe that these prosecutions should not include evidence of mere abstract beliefs or mere membership in an organization from becoming a basis for such prosecutions. The hate crimes bill accomplishes these goals by providing a stronger federal response to criminal civil rights violations, but tempering it with clear protections for free speech.

The Persistent Problem of Criminal Civil Rights Violations

The ACLU supports providing remedies against invidious discrimination and urges

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that discrimination by private persons be made illegal when it excludes persons from access to fundamental rights or from the opportunity to participate in the political or social life of the community. The serious problem of crime directed at members of society because of their race, color, religion, gender, national origin, sexual orientation, gender identity, or disability merits legislative action.

Such action is particularly timely as a response to the rising tide of violence directed at people because of such characteristics. Those crimes convey a constitutionally unprotected threat against the peaceable enjoyment of public places to members of the targeted group.

Pursuant to the Hate Crime Statistics Act, the Federal Bureau of Investigation annually collects and reports statistics on the number of bias-related criminal incidents reported by local and state law enforcement officials. For 2003, based on reports from state and local law enforcement agencies, the FBI reported 7,489 incidents covered by the Act. 3,844 of those incidents were related to race, 1,343 to religion, 1,239 to sexual orientation, 1,026 to ethnicity or national origin, 33 to disability, and four to multiple categories.

Existing federal law does not provide any separate offense for violent acts based on race, color, national origin, or religion, unless the defendant intended to interfere with the victim's participation in certain enumerated activities. 18 U.S.C.A. § 245(b)(2). During hearings in the Senate and House of Representatives, advocates for racial, ethnic, and religious minorities presented substantial evidence of the problems resulting from the inability of the federal government to prosecute crimes based on race, color, national origin, or religion without any tie to an enumerated activity. Those cases include violent crimes based on a protected class, which state or local officials either inadequately investigated or declined to prosecute.

In addition, existing federal law does not provide any separate offense whatsoever for violent acts based on sexual orientation, gender, gender identity, or disability. The exclusion of sexual orientation, gender, gender identity, and disability from section 245 of the criminal code can have bizarre results. For example, in an appeal by a person convicted of killing an African-American gay man, the defendant argued that "the evidence established, if anything, that he beat [the victim] because he believed him to be a homosexual and not because he was black." United States v. Bledsoe, 728 F.2d 1094, 1098 (8th Cir. 1984), cert. denied, 469 U.S. 838 (1984). Among the evidence that the court cited in affirming the conviction because of violence based on race, was testimony that the defendant killed the African-American gay victim, but allowed a white gay man to escape. Id. at 1095, 1098. Striking or killing a person solely because of that person's sexual orientation would not have resulted in a conviction under that statute.

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who wrote that she "was gang-raped for being a lesbian. Four men beat me, spat on me, urinated on me, and raped me . . . . When I reported the incident to Fresno police, they were sympathetic until they learned I was homosexual. They closed their book, and said, 'Well, you were asking for it.'"

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The problem of crimes based on gender is also persistent. For example, two women cadets at the Citadel, a military school that had only recently opened its doors to female students, were singled out and "hazed" by male cadets who did not believe that women had a right to be at the school. Male cadets allegedly sprayed the two women with nail polish remover and then set their clothes ablaze, not once, but three times within a two month period. One male cadet also threatened one of the two women by saying that he would cut her "heart out" if he ever saw her alone off campus.

Federal legislation addressing such criminal civil rights violations is necessary because state and local law enforcement officers are sometimes unwilling or unable to prosecute those crimes because of either inadequate resources or their own bias against the victim. The prospect of such failure to provide equal protection of the laws justifies federal jurisdiction.

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The New Bill Provides Strong Protection of Free Speech

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Fourteen years ago, the ACLU submitted a brief to the Supreme Court urging the Court to uphold a Wisconsin hate crime sentencing enhancement statute as constitutional. However, the ACLU also asked the Court "to set forth a clear set of rules governing the use of such statutes in the future." The ACLU warned the Court that "if the state is not able to prove that a defendant's speech is linked to specific criminal behavior, the chances increase that the state's hate crime prosecution is politically inspired." The evidentiary provision in the House bill will help avoid that harm.

The ACLU appreciates the sponsors' inclusion of the evidentiary provision that prevents the hate crimes legislation from having any potentially chilling effect on constitutionally protected speech. The evidentiary subsection in the bill provides that:

> **Evidence of expression or association of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the**

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This provision in the House bill almost exactly copies a paragraph in the Washington State hate crimes statute. Wash. Rev. Code § 9A.36.080(4). This Washington State language is not new; the paragraph was added to the Washington State statute as part of an amendment in 1993. The ACLU has conferred with litigators involved in hate crimes prevention in Washington State. They report no complaints that the provision inappropriately impedes prosecutions.

On its face, the hate crimes bill punishes only the conduct of intentionally selecting another person for violence because of that person's race, color, national origin, religion, gender, sexual orientation, gender identity, or disability. The prosecution must prove the conduct of intentional selection of the victim. Thus, the hate crimes bill, like the present principal criminal civil rights statute, 18 U.S.C. § 245 ("section 245"), punishes discrimination (an act), not bigotry (a belief).

The federal government usually proves the intentional selection element of section 245 prosecutions by properly introducing ample evidence related to the chain of events. For example, in a section 245 prosecution based on race, a federal court of appeals found that the prosecution met its burden of proving that the defendant attacked the victim because of his race by introducing admissions that the defendant stated that "he had once killed a nigger queen," that he attacked the victim "[b]ecause he was a black fag," and by introducing evidence that the defendant allowed a white gay man to escape further attack, but relentlessly pursued the African-American gay victim. Bledsoe, 728 F.2d at 1098.

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The decision admitting that evidence of a tattoo confirmed our concerns expressed in the ACLU's brief filed with the Supreme Court in support of the Wisconsin hate crimes penalty enhancement statute. In asking for guidance from the Court on the applicability of such statutes, the ACLU stated its concern that evidence of speech should not be relevant unless "the government proves that [the evidence] is directly related to the underlying crime and probative of the defendant's discriminatory intent." The ACLU brief urged that, "[a]t a minimum, any speech or association that is not contemporaneous with the crime must be part of the chain of events that led to the crime. Generalized evidence concerning the defendant's racial views is not sufficient to meet this test."

The evidentiary provision in the House hate crimes bill is important because, without it, we could see more evidence of unrelated speech admitted in hate crime prosecutions. Many of the arguments made in favor of hate crime legislation today are very different than the arguments made in favor of enacting section 245 37 years ago. At that time, the focus was on giving the federal government jurisdiction to prosecute numerous murders of African-Americans, including civil rights workers, which had gone unpunished by state and local prosecutors. The intent was to have

a federal backstop to state and local law enforcement.

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The evidentiary provision removes the danger that--after years of debate focused on combating "hate"--courts, litigants, and jurors applying a federal hate crime statute could be more likely to believe that speech-related evidence that is unrelated to the chain of events leading to a violent act is a proper basis for proving the intentional selection element of the offense. The provision will stop the temptation for prosecutors to focus on proving the selection element by showing "guilt by association" with groups whose bigoted views we may all find repugnant, but which may have had no role in committing the violent act. We should add that evidence of association could also just as easily focus on many groups representing the very persons that the hate crimes bill should protect.[1] The evidentiary provision in

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The evidentiary provision in the House hate crimes bill is not overly expansive. The provision will bar only evidence that had no specific relationship to the underlying violent offense. It will have no effect on the admissibility of evidence of speech that bears a specific relationship to the underlying crime--or evidence used to impeach a witness. Thus, the proposal will not bar all expressions or associations of the accused. It is a prophylactic provision that is precisely tailored to protect against the chilling of constitutionally protected free speech.

We strongly urge you to call Chairman Conyer's office at 202-225-6906 to cosponsor the Local Law Enforcement Hate Crimes Prevention Act of 2007. Please do not hesitate to call us at 202-675-2308 if you have any questions regarding this legislation.

Sincerely,

Caroline Fredrickson
Director

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v. Edison Township, 797 F.2d 1250 (3rd Cir. 1986) (refusing to require the fingerprinting of door-to-door canvassers for a consumer rights group), cert. denied, sub nom. Piscataway v. New Jersey Citizen Action, 479 U.S. 1103 (1987); Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) (refusing a request to compel the disclosure of the membership list of a public school reform group); Committee in Solidarity with the People of El Salvador v. Sessions, 705 F.Supp. 25 (D.D.C. 1989) (denying a request for preliminary injunction against FBI's dissemination of information collected on foreign policy group); Alliance to End Repression v. City of Chicago, 627 F.Supp. 1044 (1985) (police infiltrated and photographed activities of a civil liberties group and an anti-war group).

Christopher Anders
Legislative Counsel

PREPARED STATEMENT OF JOE SOLMONESE, PRESIDENT, HUMAN RIGHTS CAMPAIGN

Written Statement of
Joe Solmonese
President
Human Rights Campaign

To the

Subcommittee on Crime Terrorism and Homeland Security
Committee on Judiciary
U.S. House of Representatives
Room 2141
Rayburn House Office Building
April 17, 2007

Mr. Chairman and Members of the Committee:

My name is Joe Solmonese, and I am the President of the Human Rights Campaign, America's largest civil rights organization working to achieve gay, lesbian, bisexual and transgender (GLBT) equality. By inspiring and engaging all Americans, HRC strives to end discrimination against GLBT citizens and realize a nation that achieves fundamental fairness and equality for all. On behalf of our over 700,000 members and supporters nationwide, I am honored to submit this statement in support of H.R. 1592, the Local Law Enforcement Hate Crimes Prevention Act of 2007 ("LLEHCPA").

The Local Law Enforcement Hate Crimes Prevention Act

As Americans, we must take a strong stand against violence committed against our neighbors for simply being themselves. The purpose of our government, first and foremost, is to protect all of our citizens — whether they are black, disabled, Christian or gay. While a random act of violence against any individual is always a tragic event, violent crimes based on prejudice have a much stronger impact because they have the power to terrorize an entire community. These hate crimes chip away at the very foundations of our democracy – that all citizens are created equal and are afforded the same freedoms and protections.

The public is looking to this Congress for leadership and action to combat this devastating type of violence. According to a new poll conducted by Peter Hart Research Associates, nearly three in four (73 percent) of voters favor strengthening hate crimes laws to include sexual orientation and gender identity and to give local law enforcement the tools they need to investigate and prosecute these violent acts based on bigotry.

This Congress has the best opportunity we've ever had to finally protect all Americans from hate crimes – including crimes based on sexual orientation, gender, gender identity or disability – by passing the long overdue Local Law Enforcement Hate Crimes Prevention Act. Earlier versions of this bill have already passed in both the Republican-led House (2005) and Senate (2004) in recent years only to be derailed by partisan politics. Last November, the American people rejected divisive

partisanship and sent a message that it will not stand for our leaders putting their own electoral prospects ahead of progress and protections for all our citizens.

Why the Act Is Needed

Too often GLBT people are targeted for bias-motivated violence because of who they are. Every day a hate crime is committed against someone because of their sexual orientation. Often, local law enforcement lack the resources or training needed to fully investigate and prosecute these bias-motivated crimes. Additionally, local authorities frequently lack training and understanding of transgender people, leading to a habitual mistrust of authorities by transgender individuals. This lack of understanding illustrates the need for a federal backstop for state and local authorities, particularly in cases where the local law enforcement authorities exhibit intolerance or fail to investigate or prosecute cases of transgender hate crimes.

There is a reason why this bill has been supported by 31 state Attorneys General as well as leading law enforcement organizations – because, despite progress toward equality in almost all segments of our society – hate crimes continue to spread fear and violence among entire communities of Americans and law enforcement lack the tools and resources to prevent and prosecute them. In 2003, the FBI announced that there were more than 9,000 reported hate violence victims in the United States — almost 25 victims a day, or approximately one hate crime every hour. One in six hate crimes are motivated by the victim's sexual orientation.

What the Act Would Do

The Local Law Enforcement Hate Crimes Prevention Act would strengthen the ability of law enforcement officials to investigate and prosecute hate crimes by untying the federal government's hands to protect all Americans.

Under the current federal law, enacted nearly 40 years ago, the government has the authority to help investigate and prosecute bias-motivated attacks based on race, color, national origin and religion and because the victim was attempting to exercise a federally protected right. For example, authorities became involved in a Salt Lake City case where James Herrick set fire to a Pakistani restaurant on September 13, 2001. Herrick was sentenced to 51 months incarceration on January 7, 2002, after pleading guilty to violating 18 U.S.C. § 245.

In contrast, the federal government is NOT able to help in cases where women, gay, transgender or disabled Americans are victims of bias-motivated crimes for who they are. For example, in Texas, in July of 2005, four men brutally assaulted a gay man. While punching and kicking him, whipping him with a vacuum chord and assaulting him with daggers, the offenders told the victim that they attacked him because he was gay. Two of the men were sentenced to six years in prison under a plea bargain that dropped the charges that could have sent them to prison for life. Under this bill, federal authorities would have had the jurisdiction to prosecute the crime or could have provided local authorities resources that might have assisted them in pursuing a longer sentence.

The Act would provide crucial federal resources to state and local agencies and equip local law enforcement officers with the tools they need to investigate and prosecute crimes. While most states recognize the problem of hate violence, and many have enacted laws to help combat this serious issue, federal government recognition of the problem is crucial to its solution. Too many local

jurisdictions lack the full resources necessary to prosecute hate crimes. For example, when Matthew Shepard was murdered in Laramie, WY, in 1998, the investigation and prosecution of the case cost the community of 28,000 residents about $150,000, forcing the sheriff's department to layoff five deputies in order to save money.

The Act would allow federal authorities to become involved if local authorities are unwilling or unable to act. In the hate crime on which the film "Boys Don't Cry" was based, 21 year-old Brandon Teena was raped and later killed by two friends after they discovered he was biologically female. After the rape and assault, Teena reported the crime to the police, but Richardson County Sheriff, Richard Laux, who referred to Teena as "it," did not allow his deputies to arrest the two men responsible. Five days later, those two men shot and stabbed Teena to death in front of two witnesses, Lisa Lambert and Philip DeVine, who were then also murdered. JoAnn Brandon, Teena's mother, filed a civil suit against Sheriff Laux, claiming that he was negligent in failing to arrest the men immediately after the rape. The court found that the county was at least partially responsible for Teena's death and characterized Sheriff Laux's behavior as "extreme and outrageous." Had this federal hate crime law been in effect, federal authorities could have investigated and prosecuted the offenders when the local authorities refused to do so.

The Act is Consistent with First Amendment Freedoms

Opponents of the bill love to state that this law would "punish thoughts." Those claims are not only unfounded, but fly in the face of our experience with hate crimes laws. The Supreme Court has clearly ruled that considering bias as a motivation for the crime does not run afoul of the First Amendment. Two Supreme Court cases from the early 1990's, *R.A.V. v. City of St. Paul* and *Wisconsin v. Mitchell,* clearly demonstrate that a criminal statute may consider bias motivation when that motivation is directly connected to a defendant's criminal *conduct.* By requiring this connection to criminal activity, the Court has drawn a sharp distinction between punishing thought and punishing bias motivated violence. In *Wisconsin v. Mitchell,* the Supreme Court made clear that "the First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."

The Local Law Enforcement Hate Crimes Prevention Act punishes only violent <u>actions</u> – not thoughts or beliefs -- based on prejudice. The legislation clearly states the defendant must have willfully caused bodily injury or, through the use of fire, a firearm, or an explosive or incendiary device, attempted to cause bodily injury. In fact, the Act actually protects religious liberty by addressing violence against individuals based on their religion. Such attacks are among the most prevalent hate crimes, and many religious groups support this hate crime legislation precisely *because* it could stem violent acts motivated by religious bigotry.

Explicit Inclusion of Gender Identity is Necessary

The Human Rights Campaign is pleased that once again the House, and, for the first time, the Senate, have introduced this legislation with explicit inclusion of gender identity as a protected category. Explicit language will ensure that violent crimes targeting transgender people do not slip through the cracks.

Developments in state and local law have made clear that in order best to fulfill the legislative intent of including the transgender community, the LLEHCPA should contain explicit language. When a

court is presented with the question, "may a defendant be convicted under a hate crimes statute for committing a violent crime against a person because of their transgender status," we need to ensure that the answer will be "yes."

Explicit language about gender identity has become the "state of the art" for hate crimes laws. In recognition of the significant problem that exists, many state and local laws now contain clear and explicit coverage for the transgender community. Today, ten states and the District of Columbia have explicit transgender-inclusive language in their hate crimes statutes, like "gender identity." In addition, many local hate crimes ordinances use similar language to ensure that transgender persons are protected.

We also support the bill's amendment to the Hate Crimes Statistics Act that would add "gender" and "gender identity" to the categories of bias-motivated violence statistics collected by the FBI. Far too little is known about bias-motivated violence based on gender identity. What we do know indicates that transgender individuals are disproportionately affected by violent, bias-motivated crime. Collecting statistics on these types of crimes will provide the law enforcement community with vital information in the effort to combat this type of violence.

Support for this Legislation is Strong

According to Hart Research, large majorities of every major subgroup of the electorate — including traditionally conservative groups such as Republican men (56 percent) and evangelical Christians (63 percent) — express support for strengthening hate crimes laws to include sexual orientation and gender identity. Support also crosses racial lines — with three in four whites (74 percent), African-Americans (74 percent) and Latino/as (72 percent) supporting the Act.

In addition to public opinion polling that consistently finds the overwhelming majority of Americans in support of such legislation, federal hate crimes legislation has the support of over 200 law enforcement, civil rights, civic and religious organizations. In fact, today, hundreds of religious leaders from all faiths and all 50 states are converging on Capitol Hill to fight for the passage of this bill. The Clergy Call for Justice and Equality consists of religious and faith leaders meeting with federal legislators to express their support of the bill and the need to pass the Act.

Hate crimes *are* different from other crimes. Hate crimes send the poisonous message that some Americans deserve to be victimized solely because of their race, ethnic background, religion, gender, sexual orientation, gender identity or disability. They are unique in that they terrorize an entire community. Whether it is the burning of a church or a shooting at a gay bar, hate crimes send the message that a particular group of people are not welcome because of who they are. Such a message is antithetical to the American way of life.

Mr. Chairman, the time to pass this legislation is long overdue. As the daily news reports of bias-motivated violence shows, hate crimes will not simply go away if they are ignored. We urge you to pass this legislation and give local law enforcement the resources they need to bring the scourge of violent, bias-motivated crime to an end. Thank you.

International Association of
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Fax: 703-836-4543
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March 26, 2007

Chairman John Conyers
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Mark Kirk
United States House of Representatives
Washington, DC 20515

Dear Chairman Conyers and Representative Kirk:

On behalf of the International Association of Chiefs of Police (IACP), I am writing to express our strong support for the Local Law Enforcement Hate Crimes Prevention Act. The legislation will allow the federal government to provide technical support to state and local law enforcement agencies that are investigating hate crimes. In addition, the legislation authorizes the Department of Justice to provide grants to state and local law enforcement agencies to cover the costs of investigating and prosecuting hate crimes.

Most hate crimes are, and should continue to be, investigated and prosecuted by state, tribal, and local authorities. Unfortunately, there are instances, where as a result of either insufficient resources or a lack of jurisdiction, state, tribal and local authorities are unable to properly investigate these crimes. In response, the legislation provides the Department of Justice (DOJ) with jurisdiction in crimes of violence which were motivated because of an individual's race, color, religion, national origin, disability, gender, gender identity or sexual orientation.

However, the legislation properly bars the exercise of federal jurisdiction until the DOJ certifies that state authorities have requested that the federal government assume jurisdiction or that they have consulted with state, tribal and local law enforcement and have determined that local authorities are either unwilling or unable to act.

The passage of the Local Law Enforcement Hate Crimes Prevention Act will greatly assist state, tribal and local law enforcement agencies in investigating and prosecuting hate crimes. Thank you for your continued leadership and attention to this vital issue.

The IACP stands ready to assist in any way possible.

Sincerely,

Joseph C. Carter
President

MAJOR CITIES CHIEFS ASSOCIATION
6716 Alexander Bell Drive, Columbia, MD 21046
410-433-8909—410-433-9010

April 17, 2007

United States House of Representatives
Washington, D. C.

Dear Representative:

The Major Cities Chiefs write to express our support for HR 1592, the Local Law Enforcement Hate Crime Prevention Act (LLEHCPA). Hate crime merits a priority response because of its special impact on victims. These crimes – designed to intimidate whole communities on the basis of personal and immutable characteristics – can spark widespread neighborhood conflicts and damage the fabric of our society, especially in major metropolitan cities across our country. In partnership with community-based organizations, the law enforcement community has played a leadership role in supporting hate crime penalty-enhancement and data collection initiatives and continues to urge passage of this important legislation.

State and local law enforcement authorities have a large stake in the passage of HR 1592. The measure would provide authority for local law enforcement officials to request technical, forensic, prosecutorial or other forms of assistance in crime investigation from the Department of Justice for violence motivated by prejudice based on race, color, religion, national origin, sexual orientation, gender, gender identity, or disability. Specifically, this measure would give local law enforcement officials important tools to combat violent, bias-motivated crime. Federal support, through training or direct access, will help ensure that bias-motivated violence is effectively investigated and prosecuted. The legislation would also facilitate federal investigations and prosecutions when local authorities are unwilling or unable to achieve a just result.

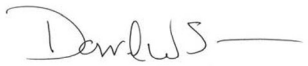
In the aftermath of the 9/11 terrorist incidents, crime-fighting partnerships between federal and state and local authorities is more important than ever. While state and local authorities investigate and prosecute the overwhelming majority of hate crime cases, and the federal government can be expected to continue to defer

to state authorities after the enactment of the LLEHCPA, it is important to law enforcement to have the tools they need to combat such a divisive act as a hate crime.

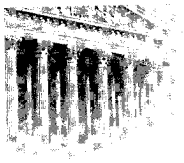
Police officials across the country have come to appreciate the law enforcement and community benefits of tracking hate crime and responding to it in a priority fashion. Law enforcement officials now more than ever understand that they can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims.

Police executives should seek opportunities to speak out against bigotry, intolerance and prejudice in our society. It is hard to overstate the importance of outspoken leadership in opposition to all forms of bigotry. Civic leaders set the tone for the national discourse and have an essential role in shaping attitudes. It is for these reasons and more that MCC supports passage of HR 1592.

Sincerely,



Darrel W. Stephens, President
Major Cities Chiefs



Local Law Enforcement Hate Crimes Prevention Act of 2007

SUPPORT FOR THIS LEGISLATION

The Local Law Enforcement Hate Crimes Prevention Act is supported by thirty state Attorneys General and over 230 national law enforcement, professional, education, civil rights, religious, and civic organizations.

A. Philip Randolph Institute
AIDS National Interfaith Network
African American Ministers in Action
African-American Women's Clergy Association
Alexander Graham Bell Association for the Deaf and Hard of Hearing (AG Bell)
Alliance for Rehabilitation Counseling
American-Arab Anti-Discrimination Committee
American Association for Affirmative Action
American Association of University Women
American Association on Health and Disability
American Association on Intellectual and Developmental Disabilities
American Association on Mental Retardation (AAMR)
American Association of People with Disabilities (AAPD)
American Citizens for Justice
American Civil Liberties Union
American Conference of Cantors
American Council of the Blind
American Counseling Association
American Dance Therapy Association
American Ethical Union, Washington Office
American Federation of Government Employees
American Federation of Musicians
American Federation of State, County, and Municipal Employees, AFL-CIO
American Federation of Teachers
AFL-CIO
American Foundation for the Blind
American Islamic Congress
American Jewish Committee
American Jewish Congress
American Medical Association
American Medical Rehabilitation Providers Association (AMRPA)
American Music Therapy Association
American Network of Community Options and Resources (ANCOR)
American Nurses Association
American Occupational Therapy Association (AOTA)
American Psychological Association
American Rehabilitation Association
American Speech-Language Hearing Association
American Therapeutic Recreation Association
American Psychological Association
Americans for Democratic Action
American Veterans Committee
And Justice For All
Anti-Defamation League
Aplastic Anemia Foundation of America, Inc.
Arab American Institute
The Arc of the United States
Asian American Justice Center
Asian American Legal Defense & Education Fund
Asian Law Caucus
Asian Pacific American Labor Alliance
Asian Pacific American Legal Center
Association for Gender Equity Leadership in Education
Association of Tech Art Projects (ATAP)
c/o Washington Partners LLP
Association of University Centers on Disabilities (AUCD)
Autism Society of America
AYUDA
Bazelon Center for Mental Health Law
Bi-Net
B'nai B'rith International
Brain Injury Association, Inc.
Break the Cycle
Buddhist Peace Fellowship
Business and Professional Women, USA
Catholics for Free Choice
Center for Community Change
Center for Democratic Renewal
Center for the Study of Hate & Extremism
Center for Women Policy Studies
Central Conference of American Rabbis
Chinese American Citizens Alliance
Christian Church Capital Area
Church Women United
Coalition of Black Trade Unionists
Coalition of Labor Union Women
Colorado Coalition Against Sexual Assault (CCASA)
Communication Workers of America
Congress of National Black Churches
Consortium of Developmental Disabilities Councils
Council for Learning Disabilities
Council of State Administrators of Vocational Rehabilitation
Cuban American National Council
Democrats.com
Disability Rights Education and Defense Fund
Disciples of Christ Advocacy Washington Network
Disciples Justice Action Network

Easter Seals
The Episcopal Church
Epilepsy Foundation
Equal Partners in Faith
Equal Rights Advocates, Inc.
Evangelical Lutheran Church of America, Office for Government Affairs
Fair Employment Council of Greater Washington
Family Pride Coalition
Federal Law Enforcement Officers Association
Federally Employed Women
Feminist Majority
Friends Committee on National Legislation
Gay, Lesbian and Straight Education Network
Gender Public Advocacy Coalition
GenderWatchers
General Federation of Women's Clubs
Goodwill Industries International, Inc.
Hadassah, the Women's Zionist Organization of America
Helen Keller National Center
Hispanic American Police Command Officers Association
Hispanic National Law Enforcement Association
Human Rights Campaign
Human Rights First
The Indian American Center for Political Awareness
Interfaith Alliance
International Association of Chiefs of Police
International Association of Jewish Lawyers and Jurists
International Association of Jewish Vocational Services
International Brotherhood of Teamsters
International Dyslexia Association
International Union of United Aerospace and Agricultural Implements
Japanese American Citizens League
Jewish Council for Public Affairs
Jewish Labor Committee
Jewish Reconstructionist Federation
Jewish War Veterans of the USA
Jewish Women International
JAC-Joint Action Committee
Justice for All
LDA, The Learning Disabilities Association of America
Labor Council for Latin American Advancement
Latino/a, Lesbian, Gay, Bisexual & Transgender Organization
Lawyers' Committee for Civil Rights Under Law
Leadership Conference on Civil Rights
LEAP- Leadership Education for Asian Pacifics, Inc.
Learning Disabilities Association of America
League of Women Voters
League of United Latin American Citizens (LULAC)
Legal Momentum
Log Cabin Republicans
Major Cities Chiefs Association
MALDEF - Mexican American Legal Defense & Education Fund
MANA - A National Latina Organization
Maryland State Department of Education
Matthew Shepard Foundation
The McAuley Institute
Methodist Federation for Social Action
Moderator's Global Justice Team of Metropolitan Community Churches
National Abortion Federation
NAACP
NAACP Legal Defense and Educational Fund, Inc.
NA'AMAT USA
NAKASEC- National Korean American Service & Education Consortium, Inc
National Abortion Federation
National Asian Pacific American Women's Forum
National Asian Peace Officers Association
National Association for Multicultural Education
National Association of Commissions for Women
National Alliance on Mental Illness (NAMI)
National Alliance of Postal and Federal Employees
National Asian Pacific American Bar Association
National Association for the Education and Advancement of Cambodian, Laotian and Vietnamese Americans
National Association of Collegiate Women Athletics Administrators
National Association of the Deaf
National Association of Developmental Disabilities Councils (NADDC)
National Association of Latino Elected and Appointed Officials (NALEO)
National Association of Lesbian, Gay, Bisexual and Transgender Community Centers
National Association for Multicultural Education
National Association of People with AIDS
National Association of Private Schools for Exceptional Children
National Association of Rehabilitation Research and Training Centers
National Association of School Psychologists
National Association of Social Workers
National Black Police Association
National Black Women's Health Project
National Center for Lesbian Rights
National Center for Transgender Equality
National Center for Victims of Crime
National Center for Women & Policing
National Coalition Against Domestic Violence
National Coalition for Asian Pacific American Community Development
National Coalition of Anti-Violence Programs
National Coalition on Deaf-Blindness
National Coalition of Public Safety Officers
National Conference for Community and Justice (NCCJ)
National Congress of American Indians
National Congress of Black Women
National Council of Churches of Christ in the USA
National Council of Jewish Women
National Council of La Raza
National Council of Women's Organizations
National Disability Rights Network

National District Attorneys Association
National Down Syndrome Society (NDSS)
National Education Association
National Federation of Filipino American Associations
National Fragile X Foundation (Fragile X)
National Gay and Lesbian Task Force
National Hispanic Leadership Agenda (NHLA)
National Italian American Foundation
National Jewish Democratic Council
National Korean American Service and Education Consortium
National Latino Police Officers Association
National League of Cities
National Mental Health Association
National Multicultural Institute
National Newspaper Publishers Association
National Organization of Black Law Enforcement Executives
National Organization for Women
National Parent Network on Disabilities
National Partnership for Women & Families
National Puerto Rican Coalition, Inc.
National Rehabilitation Association
National Respite Network
National Sheriffs' Association
National Spinal Cord Injury Association
National Spiritual Assembly of the Baha'is of the United States
National Structured Settlement Trade Association (NSSTA)
National Therapeutic Recreation Society
National Urban League
National Victim Center
National Women's Conference
National Women's Committee (NWC)
National Women's Law Center
National Youth Advocacy Coalition
NISH
NOW - National Organization for Women
NOW Legal Defense & Education Fund
NETWORK, A National Catholic Social Justice Lobby
9to5 Atlanta
9to5 Bay Area
9to5 Colorado
9to5 Los Angeles
9to5 Poverty Network Initiative (Wisconsin)
9to5, National Association of Working Women
North American Federation of Temple Youth
Northwest Women's Law Center
Organization of Chinese Americans
ORT- Organization for Educational Resources and Technological Training
Paralyzed Veterans of America
Parents, Families and Friends of Lesbians and Gays
People For the American Way
Police Executive Research Forum
Police Foundation
Presbyterian Church (USA), Washington Office
Pride at Work
Project Equality, Inc.
Rainbow/PUSH Coalition
Rehabilitation Engineering and Assistive Technology Society of North America
Research Institute for Independent Living
The Rabbinical Assembly
Rock the Vote
Sargent Shriver National Center on Poverty Law
School Social Work Association of America
Service Employees International Union, AFL-CIO
Sikh American Legal Defense and Education Fund (SALDEF)
Society for the Psychological Study of Social Issues
South Asian American Leaders of Tomorrow (SAALT)
Southeast Asia Resource Action Center
Spina Bifida Association of America
Union of Reform Judaism
Union of Needletrades, Industrial & Textile Employees (UNITE)
Unitarian Universalist Association
United Cerebral Palsy
United Church of Christ – Justice and Witness Ministries
United Church of Christ - Office of Church in Society
United Food and Commercial Workers International Union
United Methodist Church – General Board of Church and Society
United Methodist Church - General Commission on Religion and Race
United Spinal Association
The United States Conference of Mayors
United States Student Association
United Synagogue of Conservative Judaism
Washington Teachers Union
The Woman Activist Fund, Inc.
Women Employed
Women of Reform Judaism, Federation of Temple Sisterhoods
Women Work!
Women's Alliance for Theology, Ethics & Ritual
Women's American ORT
The Women's Institute for Freedom of the Press
Women's Law Center of Maryland, Inc.
Women's Research and Education Institute (WREI)
World Institute on Disability (WID)
YWCA of the USA

Updated April, 2007

National Partnership for Women & Families

April 12, 2007

Dear Representative:

We, the undersigned women's advocacy organizations, write to urge your support for H.R. 1592, the Local Law Enforcement Hate Crime Prevention Act of 2007 ("LLEHCPA"). As organizations devoted to women's rights and women's progress, we have a shared commitment to equal justice under law and to protecting the right of all people to live full and free lives, without fear of bias-driven violence or intimidation. We fully support this vital legislation because we believe it provides much-needed protections and tools to combat – and help eliminate – hate and bias crimes.

Gender-Based Hate Crimes Have Devastating Consequences

Like hate violence against racial, ethnic, and religious minorities, crimes motivated by gender bias – aimed at women or men – are a form of discrimination that menaces the individual victim and the entire community. Attacks motivated by gender bias instill a fear in their intended victims that not only threatens their lives, but also can restrict where they work, study, travel, and live. Such crimes are particularly insidious because they target individuals for who they are and thus put victims at risk at all times and in any situation.

Strengthening Current Law is Essential to Combating Hate Crimes

Existing federal hate crimes laws authorize federal involvement in the prosecution of non-federal hate crimes only in those cases in which the victim was targeted because of race, color, religion, or national origin. The LLEHCPA would fill a gap in current law by authorizing the Department of Justice to investigate and prosecute certain violent crimes motivated by the victim's gender or gender identity, sexual orientation, and disability. In addition, the law strengthens protections against bias-motivated crimes by removing unduly rigid restrictions on when the federal government can assist local authorities in the prosecution of hate crimes. Further, the new provisions prohibiting gender-motivated hate crimes, coupled with the prohibitions against hate crimes based on race or ethnicity, will provide women of color with important protections, enabling them to challenge violent crimes fueled by prejudice based on multiple factors such as race and gender. Finally, the LLEHCPA will create a valuable mechanism to provide needed additional information about the nature and the magnitude of these crimes. The bill would require the FBI to collect statistics on gender-motivated crimes from police departments across the country under the Hate Crime Statistics Act of 1990.

These changes are crucial for women who otherwise would not be afforded relief by the justice system. While local law enforcement has made significant advances in responding to crimes such as domestic violence, rape, and sexual assault, state and local prosecutors and judges may be insufficiently informed about or otherwise unable to adequately prosecute gender-motivated

hate crimes and may attribute violence against women to other motives. In such cases, an inadequate response by police or prosecutors can leave survivors of sexual and domestic violence vulnerable to further violence, even death.

Limited Federal Jurisdiction Is Needed to Fill the Gaps in Current Law

The LLEHCPA would establish uniform federal protections against gender-motivated bias crimes as a backstop to existing laws in every state. Currently, only twenty-eight states include gender-based crimes in their hate crimes statutes. Further, while the federal Violence Against Women Act ("VAWA") addresses intimate-partner violence, it does not specifically address gender-motivated hate crimes. In addition, the criminal remedies available under VAWA only apply in cases of interstate domestic violence, interstate stalking, and interstate violations of a protective order. Just as Congress recognized the need for a federal remedy to address violence against African-Americans in 1968 when some local officials failed to prosecute racially-motivated crimes, so too should Congress recognize the need for a federal remedy to address violent crimes motivated by gender bias in those discrete instances in which local authorities are unable or unwilling to act.

Providing authority for the federal government to investigate and prosecute certain gender-bias crimes is not unprecedented. In 1994, Congress enacted a penalty-enhancement law for federal crimes "in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." 28 U.S.C. § 994 Note. The LLEHCPA would complement this provision by allowing for limited federal jurisdiction in certain state bias crime cases.

Federal Jurisdiction Would Operate Only When Necessary and After Jurisdictional Prerequisites Have Been Met

Under the LLEHCPA, local law enforcement officials would continue to prosecute the vast majority of gender-motivated hate crimes. However, this legislation will help ensure an appropriate law enforcement response in those cases of gender-based hate crimes when the local authorities either cannot act or fail to do so. The LLEHCPA would allow for federal prosecution when, for instance, the local police fail to respond to complaints of violence resulting from gender bias because the police are friends or relatives of the perpetrator, or when local law enforcement officials face jurisdictional obstacles over an out-of-state individual suspected of committing a gender-based hate crime. Under current law, such crimes may escape effective prosecution, leaving the victims without an appropriate remedy and the perpetrators free to continue inflicting harms propelled by gender hatred. In addition, in jurisdictions where there is a systemic failure to address violence motivated by gender bias, a federal prosecution can send a message that such a widespread violation of women's rights will not be tolerated.

This legislation would not convert every instance of domestic violence, rape, or sexual assault

into a prosecution under the federal hate crime law. The law applies only to felony crimes that involve a direct connection to interstate or foreign commerce, which requires, for example, that the perpetrator or victim crossed state lines or that the perpetrator employed a weapon that traveled in interstate commerce. The legislation also limits federal involvement to those instances in which the Attorney General (or an authorized designee) not only certifies that the crime appears to be motivated by gender bias, but also confirms the need for federal intervention by certifying in each instance that local officials cannot or will not act or have requested federal assistance, or that the state prosecution was inadequate.

Further, not every violent crime against women is a bias crime, just as not every crime against an African-American is based on racial prejudice. Federal courts already routinely assess the question of gender motivation in the context of workplace discrimination claims and claims raised under other federal civil rights laws, such as 42 U.S.C. § 1983. Prosecutors and judges can rely on the same totality of the circumstances analysis that would pertain to the other protected bases under the law – considering the language, nature and severity of the attack, absence of another apparent motive, patterns of behavior, and common sense – to determine whether a violent crime was motivated by gender bias.

A look at the actual numbers of prosecutions under state hate crimes laws further stems any concern that this legislation will open the floodgates to federal hate crimes prosecutions. States that recognize gender-based hate crimes have not been overwhelmed by prosecutions of domestic violence, rape, and sexual assault under their existing hate crimes laws. Instead, these laws have operated in a very targeted way. The experience in these states demonstrates that protection against gender-motivated bias crimes is essential.

Therefore, the undersigned women's advocacy organizations request your support for H.R. 1592, the Local Law Enforcement Hate Crime Prevention Act of 2007, to provide adequate enforcement mechanisms to address and deter gender-motivated hate crimes and ensure that safety is guaranteed to *all.*

Sincerely,

9to5 Bay Area
9to5 Colorado
9to5 Poverty Network Initiative (Wisconsin)
9to5, National Association of Working Women
AFL-CIO Department of Civil, Human and Women's Rights
American Association of University Women
Atlanta 9to5
Break the Cycle
Coalition of Labor Union Women
Colorado Coalition Against Sexual Assault (CCASA)

Communications Workers of America, AFL-CIO
Democrats.com
Equal Rights Advocates, Inc.
Feminist Majority
Gender Public Advocacy Coalition (GenderPAC)
GenderWatchers
Hadassah, the Women's Zionist Organization of America
Legal Momentum
Los Angeles 9to5
NA'AMAT USA
National Abortion Federation
National Asian Pacific American Women's Forum
National Association of Social Workers
National Center for Lesbian Rights
National Congress of Black Women
National Council of Jewish Women
National Council of Women's Organizations
National Organization for Women
National Partnership for Women & Families
National Women's Conference
National Women's Committee (NWC)
National Women's Law Center
Northwest Women's Law Center
Sargent Shriver National Center on Poverty Law
The Women's Institute for Freedom of the Press
Washington Teachers Union
Women Employed
Women's Law Center of Maryland, Inc.
Women's Research & Education Institute (WREI)
YWCA USA

CCD

CONSORTIUM FOR CITIZENS WITH DISABILITIES

April 16, 2007

Dear Representative:

The undersigned member organizations of the Consortium for Citizens with Disabilities (CCD) are writing to urge your support for the Local Law Enforcement Hate Crime Prevention Act of 2007 (LLEHCPA), which would grant agencies the authority to investigate and prosecute federal crimes based on the victim's disability, whether real or perceived, and would authorize funding to states to help with the prosecution of Hate Crimes.

Through much of our country's history and well into the twentieth century, people with disabilities -- including those with developmental delays, epilepsy, cerebral palsy and other physical and mental impairments -- were seen as useless and dependent, hidden and excluded from society, either in their own homes or in institutions. Now, this history of isolation is gradually giving way to inclusion in all aspects of society, and people with disabilities everywhere are living and working in communities alongside family and friends. But this has not been a painless process. People with disabilities often seem "different" to people without disabilities. They may look different or talk different. They may require the assistance of a wheel-chair, a cane or other assistive technologies. They may have seizures or have difficulty understanding seemingly simple directions.

These perceived differences evoke a range of emotions in others, from misunderstanding and apprehension to feelings of superiority and hatred. Bias against people with disabilities takes many forms, often resulting in discriminatory actions in employment, housing, and public accommodations. Laws like the Fair Housing Amendments Act, the Americans with Disabilities Act and the Rehabilitation Act are designed to protect people with disabilities from this type of prejudice.

Perhaps most unfortunately, disability bias can also manifest itself in the form of violence — and it is imperative that a message be sent to our country that these acts of bias motivated hatred are not acceptable in our society.

The federal government currently has very limited authority to investigate and prosecute disability-bias **federal** crimes. In 1994, Congress enacted a penalty-enhancement law for **federal**

crimes in which the defendant intentionally selects a victim because of the person's "actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person" [28 USC 994 Note]. Also in 1994, Congress extended the Hate Crime Statistics Act of 1990, a law requiring the FBI to collect hate crime statistics from state and local law enforcement authorities, to include disability-based hate crimes. Still, hate crimes against those with disabilities remain vastly under-reported.

The LLEHCPA will broaden the definition of hate crimes to include disability, sexual orientation, gender and gender identity. It also makes grants available to state and local communities to combat violent crimes committed by juveniles, train law enforcement officers or to assist in state and local investigations and prosecutions of bias motivated crimes.

Thirty-one states and the District of Columbia have already recognized the importance of this issue and have included people with disabilities as a protected class under their hate crimes statutes. However, protection is neither uniform nor comprehensive, and this has important practical and symbolic results. It is vital for the federal government to send the message that hate crimes committed because of disability bias are as intolerable as those committed because of a person's race, ethnicity, national origin, or religion. The crucial resources provided to local law enforcement in the Local Law Enforcement Hate Crime Prevention Act of 2007, would give meaning and substance to this important message. It is critical that people with disabilities share in the protection of the federal hate crimes statute.

Too frequently, bias-motivated crimes against those with disabilities have gone unreported and unprosecuted. The special problems associated with investigating and prosecuting hate violence against someone with a disability makes the availability of federal resources for state and local authorities all that much more important to ensure that justice prevails.

We urge you to support the Local Law Enforcement Hate Crime Prevention Act of 2007. This legislation is vitally important for this vulnerable population and must be enacted in order to bring the full protection of the law to those targeted for violent, bias motivated crimes simply because they have a disability.

Sincerely,

Alexander Graham Bell Association for the Deaf and Hard or Hearing (AG Bell)

American Association on Health and Disability

American Association on Intellectual and Developmental Disabilities

American Association on Mental Retardation (AAMR)

American Association of People with Disabilities (AAPD)

American Council of the Blind

American Counseling Association

American Dance Therapy Association

American Medical Rehabilitation Providers Association (AMRPA)

American Music Therapy Association

American Network of Community Options and Resources (ANCOR)

American Occupational Therapy Association (AOTA)

American Psychological Association

American Therapeutic Recreation Association

American Rehabilitation Association

Association of Tech Act Projects (ATAP)

c/o Washington Partners LLC

Association of University Centers on Disabilities (AUCD)

Autism Society of America

Bazelon Center for Mental Health Law

Council for Learning Disabilities

Council of State Administrators of Vocational Rehabilitation

Easter Seals

Epilepsy Foundation

Hellen Keller National Center

Learning Disabilities Association of America

National Alliance on Mental Illness (NAMI)

National Association of Councils on Developmental Disabilities (NACDD)

National Coalition on Deaf-Blindness

National Disability Rights Network (NDRN)

National Down Syndrome Society (NDSS)

National Fragile X Foundation (Fragile X)

National Rehabilitation Association

National Respite Coalition (NRC)

National Structured Settlement Trade Association (NSSTA)

NISH

Paralyzed Veterans of America (PVA)

Research Institute for Independent Living

School Social Work Association of America

Spina Bifida Association

The Arc of the United States

United Cerebral Palsy

United Spinal Association

World Institute on Disability (WID)

African American Ministers in Action • American Conference of Cantors • American Islamic Congress • American Jewish Committee • Anti-Defamation League • B'nai B'rith International • Buddhist Peace Fellowship • Catholics for a Free Choice • Central Conference of American Rabbis • Disciples Justice Action Network • The Episcopal Church • Equal Partners in Faith • Friends Committee on National Legislation • Hadassah, the Women's Zionist Organization of American • Jewish Council for Public Affairs • Jewish Labor Committee • Jewish Reconstructionist Federation • Methodist Federation for Social Action • Moderator's Global Justice Team of Metropolitan Community Churches • National Council of Jewish Women • North American Federation of Temple Youth • Presbyterian Church (USA), Washington Office • Sikh American Legal Defense and Education Fund • The Interfaith Alliance • Union for Reform Judaism • Unitarian Universalist Association of Congregations • United Church of Christ, Justice and Witness Ministries • United Methodist Church, General Board of Church and Society • United Methodist Church, General Commission on Religion and Race • United Synagogue of Conservative Judaism • Women of Reform Judaism

April 16, 2007

Dear Representative,

As representatives of a diverse array of religious communities, we write to urge you to co-sponsor and vote in support of H.R. 1592, the Local Law Enforcement Hate Crimes Prevention Act (LLEHCPA). In the 109th Congress, the House approved an identical bill on September 14, 2005 as an amendment to H.R. 3132, the Children's Safety Act, with a bipartisan majority of 223-199.

Hate is neither a religious nor American value. The sacred scriptures of many different faith traditions speak with dramatic unanimity on the subject of hate. Crimes motivated by hatred or bigotry are an assault not only upon individual victims' freedoms, but also upon a belief that lies at the core of our diverse faith traditions -- that every human being is created in the image of God. While we recognize that legislation alone cannot remove hatred from the hearts and minds of individuals, the LLEHCPA will serve as a crucial step in building a society where hate-motivated crimes are deemed intolerable.

In 2005, the FBI documented 7,163 hate crimes directed against institutions and individuals because of their race, religion, sexual orientation, national origin, or disability. But these troubling statistics do not speak for themselves – because behind each and every one of these incidents are individuals, families, and communities deeply impacted by these crimes. The LLEHCPA will stream-line the process for the Department of Justice to assist local authorities to investigate and prosecute these cases – and permit federal involvement in cases that occur because of a victim's gender, disability, gender identity or sexual orientation.

Existing federal law is inadequate to address the significant national problem of hate crimes. Not only does current law contain obstacles to effective enforcement, but it also does not provide authority to investigate and prosecute bias crimes based on disability, gender, gender identity or sexual orientation. We are morally obligated to call for laws to protect all Americans from hate-motivated violence.

The LLEHCPA does not in any way violate the First Amendment protections of offenders. Hate crime laws do not restrict speech. Rather, they target only criminal conduct prompted by prejudice. Some critics of the LLEHCPA have erroneously asserted that enactment of the measure would prohibit the lawful expression of one's deeply held religious beliefs. These fears are unfounded. **The LLEHCPA does not punish, nor prohibit in any way, preaching or other expressions of religious belief, name-calling, or even expressions of hatred toward any group. It covers only violent actions that result in death or bodily injury**

Although we believe that state and local governments should continue to have the primary responsibility for investigating and prosecuting hate crimes, an expanded federal role is necessary to ensure adequate and equitable response to these divisive crimes. The federal government must have authority to address those important cases in which local authorities are either unable or unwilling to investigate and prosecute.

Now is the time for Congress to publicly reaffirm its commitment to protect all Americans from such flagrant bias-motivated violence. As people of faith and leaders in the religious community, we are committed to eradicating the egregious hatred and violence which divides our society. We believe that the LLEHCPA is vital to this struggle, and we ask you to support its passage.

Respectfully,

African American Ministers in Action
American Conference of Cantors
American Islamic Congress
American Jewish Committee
Anti-Defamation League
B'nai B'rith International
Buddhist Peace Fellowship
Catholics for a Free Choice
Central Conference of American Rabbis
Disciples Justice Action Network
The Episcopal Church
Equal Partners in Faith
Friends Committee on National Legislation

Hadassah, the Women's Zionist Organization of America
Jewish Council for Public Affairs
Jewish Labor Committee
Jewish Reconstructionist Federation
Methodist Federation for Social Action
Moderator's Global Justice Team of Metropolitan Community Churches
National Council of Jewish Women
North American Federation of Temple Youth
Presbyterian Church (SA), Washington Office
Sikh American Legal Defense and Education Fund
The Interfaith Alliance
Union for Reform Judaism
Unitarian Universalist Association of Congregations
United Church of Christ, Justice and Witness Ministries
United Methodist Church, General Board of Church and Society
United Methodist Church, General Commission on Religion and Race
United Synagogue of Conservative Judaism
Women of Reform Judaism

Leadership Conference on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006

Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

February 1, 2007

Co-Sponsor and Support the Local Law Enforcement Enhancement Act

Dear Representative:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we urge you to co-sponsor and support the Local Law Enforcement Enhancement Act (LLEEA).

The LLEEA strengthens the federal hate crimes statute by removing unnecessary obstacles to federal prosecution and by providing authority for federal involvement in a wider category of bias motivated crimes. Current hate crimes law leaves federal prosecutors powerless to intervene in bias-motivated crimes when they cannot also establish that the crime was committed because of the victim's involvement in a "federally-protected activity" such as serving on a jury, attending a public school, or voting. The LLEEA would enhance the federal response to hate crime violence by covering *all* violent crimes based on race, color, religion, or national origin. In addition, the LLEEA would permit federal involvement in the prosecution of bias-motivated crimes based on the victim's gender, sexual orientation, or disability. This expansion is critical in order to protect members of these groups from this most egregious form of discrimination.

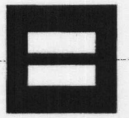
While LCCR recognizes that bigotry cannot be legislated out of existence, a forceful, moral response to hate violence is required of us all. We strongly believe Congress must do everything possible to empower the federal government to assist in local hate crime prosecutions and, where appropriate, expand existing federal authority to permit a wider range of investigations and prosecutions.

Please contact Tyler Lewis, Communications Associate, at 202/263-2894, or Nancy Zirkin at 202/263-2880 with any questions. Thank you in advance for your support.

Sincerely,

Wade Henderson
President and CEO

Nancy Zirkin
Vice President and Director of Public Policy



HUMAN
RIGHTS
CAMPAIGN®

February 2, 2007

Dear Representative:

On behalf of the Human Rights Campaign and our 600,000 members nationwide, we are writing today to urge you to become an original cosponsor of the Local Law Enforcement Hate Crimes Prevention Act which will be introduced by Representatives Conyers, Ros-Lehtinen, Frank and Baldwin later this month.

The Local Law Enforcement Hate Crimes Prevention Act (H.R. 2662 in the 109th Congress) has strong bi-partisan support. In the 109th Congress, it had the support of 159 cosponsors and was added by the House as an amendment to the Children's Safety Act (H.R. 3132) with a floor vote of 223-199. The House of Representatives has twice passed motions to instruct conferees on this matter with bipartisan majorities in 2000 and 2004. In addition to public opinion polling that consistently finds the overwhelming majority of Americans in support of such legislation, the Local Law Enforcement Hate Crimes Prevention Act has the support of over 210 law enforcement, civil rights, civic and religious organizations.

Since the Federal Bureau of Investigation (FBI) began collecting hate crimes statistics in 1991, reported bias motivated crimes based on sexual orientation more than tripled; yet the federal government has no jurisdiction to assist states and localities in dealing with even the most violent hate crimes against gay, lesbian, bisexual and transgender Americans. The FBI's 2005 Uniform Crime Reports – the most recent year we have statistics -- showed that reported violent crimes based on sexual orientation constituted 14.2 percent of all hate crimes in 2005, with 1,017 reported for the year. But the FBI statistics do not paint a complete picture. Underreporting of bias motivated violence is common and the true number of incidents is much higher. In fact, the National Coalition of Anti-Violence Programs (NCAVP), a non-profit organization that tracks bias incidents against gay, lesbian, bisexual and transgender people, reported 1,985 incidents for 2005 from only 13 jurisdictions, compared to the 12,417 agencies reporting to the FBI in 2005.

By passing this common sense anti-hate crime measure, we would bring our nation's laws into the 21st century. The Local Law Enforcement Hate Crimes Prevention Act is a logical extension of existing federal law. Since 1969, 18 U.S.C. §245 has permitted federal prosecution of a hate crime if the crime was motivated by bias based on race, religion, national origin, or color, ***and*** because the victim was exercising a "federally protected right" (e.g. voting, attending school, etc.). After over 35 years, it has become clear that the statute needs to be amended. The bill removes the federally protected activity requirement and adds actual or perceived sexual orientation, gender, disability and gender-identity to the list of covered categories, thus bringing a much needed comprehensiveness to federal law. Removing the outdated intent requirement would untie the federal government's hands and allow them to partner with state and local officials in combating serious hate crimes, those involving death and bodily injury.

We urge you to become an original sponsor this historic piece of legislation. For more information, contact us at 202-628-4160. Thank you.

Sincerely,

David M. Smith
Vice President of Policy and Strategy

Allison Herwitt
Legislative Director

WORKING FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUAL RIGHTS
1640 RHODE ISLAND AVENUE, NW WASHINGTON, DC 20036
PHONE (202) 628 4160 FAX (202) 347 5323 E-MAIL HRC@HRC.ORG

OFFICE OF GOVERNMENT & NATIONAL AFFAIRS , WASHINGTON, DC

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David Lehrer

Chief Operating Officer
CARYL M. STERN

International Affairs
KENNETH JACOBSON

Development
MARSHALL S. LEVIN

February 7, 2007

Via facsimile

Dear Representative:

On behalf of the Anti-Defamation League, we are writing to urge you to support the Local Law Enforcement Hate Crimes Prevention Act of 2007. This legislation, a top priority for the Anti-Defamation League in the 110th Congress, would strengthen existing federal hate crime laws by authorizing the Department of Justice to assist local authorities in investigating and prosecuting certain bias-motivated crimes. The bill would also provide authority for the federal government to prosecute some violent bias-motivated crimes directed against individuals on the basis of their sexual orientation, gender, gender identity, or disability. Current federal law does not provide authority for involvement in these cases at all.

This measure has repeatedly attracted majority, bipartisan support in both the Senate and the House. In the last session of Congress, the House approved the identical text of this measure as an amendment to the Children's Safety Act by a vote of 223-199 on September 14, 2005. The last time the Senate voted on this bill, in June, 2004, the bill was approved as an amendment to the National Defense Authorization Act for Fiscal Year 2005 (S. 2400) by a vote of 65-33.

In addition, the bill has been endorsed by over 210 national civil rights, professional, civic, education, and religious groups, thirty-one state Attorneys General, former US Attorney General Dick Thornburgh, and a number of the most important national law enforcement organizations in America – including the International Association of Chiefs of Police, the Major Cities Chiefs Association, the National District Attorneys Association, the National Organization of Black Law Enforcement Executives, the National Sheriffs' Association, and the Police Executive Research Forum.

Forty-five states and the District of Columbia now have enacted hate crime laws – many based on a model drafted by the Anti-Defamation League. But a significant number of states do not include coverage of crimes based on sexual orientation, gender, gender identity, or disability in their statutes. State and local authorities will continue to investigate and prosecute the overwhelming majority of hate crime cases. But this essential legislation will provide a necessary backstop to state and local enforcement by permitting federal authorities to provide assistance in these hate

Anti-Defamation League of B'nai B'rith, 1100 Connecticut Avenue, NW, Suite 1020, Washington, DC 20036
(202) 452-8320 FAX (202) 296-2371 E-mail: natlgov@adl.org Web site: www.adl.org

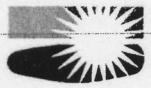
crime investigations – and by allowing federal prosecutions when state and local authorities are unable or unwilling to act.

We urge you to cosponsor the Local Law Enforcement Hate Crimes Prevention Act of 2007. Please do not hesitate to contact our office if you have questions about this legislation or if we can be helpful in any way.

Sincerely,

Michael Lieberman
Washington Counsel

Jess N. Hordes
Washington Director



Matthew Shepard Foundation
embracing diversity

Casper Office
301 Fleming #512
Casper, WY 82609
Ph. 307.237.6867 Fax. 307.337.0156
info@MatthewShepard.org

VIA FACSIMILE

March 2, 2007

Dear Representative:

On behalf of the Matthew Shepard Foundation and our family, we are writing today to ask for your support of the Local Law Enforcement Hate Crimes Prevention Act (LLEHCPA) of 2007 by becoming an original co-sponsor of the bill, which will soon be introduced in the House of Representatives.

Hate crimes are an unrelenting and under-addressed problem in the United States. By enacting the LLEHCPA, a crucial step will be taken to address incidents committed all too often against individuals based on actual or perceived sexual orientation, gender, gender identity, and disability.

In particular, hate crimes based on sexual orientation are of grave concern. According to the Federal Bureau of Investigation's (FBI) Unified Crime Reports, approximately 10,000 hate crime incidents based on sexual orientation have been reported since 1998. Consistently, since 1998, hates crimes based on sexual orientation have ranked as the third highest category of reported incidents in the United States. These are just the statistics. Behind these numbers are real human beings - our son Matthew being one of them.

On October 12, 1998, Matthew died as a result of a brutal beating motivated by anti-gay hate in Laramie, Wyoming. Two young men, who learned to hate, murdered our son because of who he was. Matthew's attack and death have become one of the most visible hate crimes in our nation's history. It demonstrates to the world that the effects of a hate crime are far-reaching. They tear at the very fabric of our society. Our family and Matthew's many friends continue to deal with the grief of losing him, at such an early age and in such a brutal manner. It continues to be difficult to understand how human beings can learn to hate so deeply that they would harm, even murder, another person. It is unconscionable, since Matthew's death more than 8 years ago, that federal hate crimes legislation to protect individuals based on their sexual orientation has yet to be enacted.

The LLEHCPA is an appropriate and much needed response that will provide local law enforcement agencies with the added resources and support needed for investigating and prosecuting serious hate crimes. The investigation of Matthew's murder and the trial of his killers cost the county more than $150,000. This unplanned financial burden forced the Albany County Sheriff's Department in Wyoming to furlough five of its employees. If the LLEHCPA had been the law of the land in 1998, this reduction to the Sheriff Department's staff could have been averted, while still ensuring that justice was served for our son.

In addition, the LLEHCPA would amend existing law to remove the restriction that a hate crime must be committed while the victim is exercising a "federally protected right", like voting or going to school, in order for federal prosecution to be permitted. It would also amend the Hate Crimes Statistics Act so that the FBI can collect important data on hate crimes committed based on gender identity and gender.

The LLEHCPA has been and will continue to be a top priority for the Matthew Shepard Foundation and our family until it is enacted. We urge you to contact the lead sponsors of the bill today and sign on as an original co-sponsor. If you have any questions or would like additional information, please contact Gregory Lewis, Managing Director, at 303-830-7400, ext. 12 or Gregory@MatthewShepard.org.

Sincerely,

Judy Shepard
Executive Director

Dennis W. Shepard
Chairman, Board of Directors

WASHINGTON BUREAU · NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1156 15TH STREET, NW SUITE 915 · WASHINGTON, DC 20005 · P (202) 463-2940 · F (202) 463-2953
E-MAIL: WASHINGTONBUREAU@NAACPNET.ORG · WEB ADDRESS WWW.NAACP.ORG

April 12, 2007

Members
United States House of Representatives
Washington, DC 20515

RE: SUPPORT FOR HATE CRIMES PREVENTION LEGISLATION

Dear Representative;

On behalf of the National Association for the Advancement of Colored People (NAACP), our nation's oldest, largest and most widely-recognized grassroots civil rights organization, I urge you, in the strongest terms possible, to co-sponsor and actively support hate crimes prevention legislation, H.R. 1592, the ***Local Law Enforcement Hate Crimes Prevention Act,*** introduced by Congressman John Conyers, Jr. (MI). In addition to being a co-sponsor, I am asking that you do all you can to see that the legislation is brought to the floor for a vote as soon as possible, and that you support the strongest version of the bill. This legislation is an important first step in the battle against hate crimes; a battle that must be won if we are going to be able to protect all of our citizens, nation and our democracy.

The *Local Law Enforcement Hate Crimes Prevention Act* is a necessary tool to help fight the continuing problem of crimes against people because of race, religion, national origin, gender, disability or sexual orientation. It would allow the federal government to work with state and local authorities to punish hate crimes to the fullest extent possible. While states should continue to play the primary role in the prosecution of hate crime violence, a federal law is needed to compliment state statutes and assist states in seeing these complicated and expensive cases through prosecution.

Hate crimes continue to plague and terrorize this nation ***and are on the increase***. Hate Crimes have a destructive impact not only on the victims, but on entire communities as well. Thus, I hope that you will do all you can to see that this legislation becomes law sooner rather than later. Thank you in advance for your attention to this matter; should you have any questions regarding the NAACP's position on this issue, please feel free to contact me at (202) 463-2940.

Sincerely,

Hilary O. Shelton
Director

ASIAN AMERICAN JUSTICE CENTER

April 12, 2007

By FAX Machine

Dear Senator:

On behalf of the Asian American Justice Center (AAJC), we are writing to urge you to co-sponsor and support the Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEHCPA). This legislation will strengthen existing federal hate crime laws. Under current law, the government must prove that the crime occurred because of a person's membership in a designated group and *because* (not simply while) the victim was engaged in specific federally-protected activities- such as serving on a jury, voting, or attending public school. This provision would eliminate these overly restrictive jurisdictional limitations, which have prevented federal involvement in a number of cases in which individuals kill or injure others because of a racial or religious hatred.

In addition, this provision would authorize the Department of Justice to assist local prosecutions, and, where appropriate, investigate and prosecute cases in which the bias violence occurs because of the victim's sexual orientation, gender, gender identity or disability. Current federal law does not provide authority for involvement in these cases at all.

Both the House and Senate have demonstrated strong support of the bill in recent years. On September 14, 2005, the House passed this legislation by an overwhelming 223 to 199 bipartisan vote, taking a historic step toward giving law enforcement the tools they need to enforce and prosecute hate crimes against gay, lesbian, bisexual and transgender persons. The measure was passed as an amendment to H.R. 3132, the "Children's Safety Act." On June 15, 2004, the Senate approved the measure as an amendment to the National Defense Authorization Act for Fiscal Year 2005 (S. 2400) by a vote of 65-33. The House approved a Motion to Instruct its conferees to retain this provision in conference on September 28, 2004, by a vote of 213-186. Unfortunately, the hate crime provisions were stripped from the final version of that legislation.

State and local authorities investigate and prosecute the overwhelming majority of hate crime cases -- and will continue to do so after the LLEHCPA is enacted. The LLEHCPA, however, would provide a necessary backstop to state and local enforcement by permitting federal authorities to provide assistance in these investigations – and by allowing federal prosecutions when state and local authorities are unable or unwilling to act.

All too often, Asian Americans find themselves victimized by hate crimes. It is important that the federal government be able to address cases that state and local authorities either cannot or will not investigate or prosecute such crimes accordingly. All hate crimes need to be taken seriously because they have a crippling effect on not only the victim, but on entire communities.

Please contact Aimee Baldillo, Director of Programs, at 202.296.2300 ext. 112 with any questions. Thank you in advance for your support.

Sincerely,

Karen K. Narasaki

Karen K. Narasaki, President and Executive Director

1140 Connecticut Ave. NW, Suite 1200 Washington, D.C. 20036 • T 202.296.2300 • F 202.296.2318 • www.advancingequality.org

The Interfaith Alliance
1331 H Street, NW Suite 1100
Washington, DC 20005
www.interfaithalliance.org

THE INTERFAITH ALLIANCE

February 20, 2007

Dear Representative,

As the president of The Interfaith Alliance, a clergy-led organization with over 185,000 members dedicated to religious liberty and pluralism, **I am writing to urge you to co-sponsor the Local Law Enforcement Hate Crime Prevention Act of 2007 (LLEHCPA).** By passing this bill, Congress can express with one voice, its commitment to ending brutal, hate-motivated violence.

As people of faith and good will, we know that while legislation alone cannot remove hate from the hearts and minds of individuals, hate crimes legislation can help to create a society where hate-motivated violence is deemed intolerable. While a few religious voices, wrongly claiming to represent the view of all religious people, continue attempts to defeat hate crimes legislation, those of us who value religious pluralism and practice interfaith cooperation must not waver in sending a strong, unified message condemning prejudice and supporting hate crimes legislation

As you may know, current law permits federal prosecution of a hate crime only if the crime was motivated by bias based on race, religion, national origin, or ethnicity, and the assailant intended to prevent the victim from exercising a "federally protected right." LLEHCPA would expand federal jurisdiction to reach violent hate crimes committed "because of the actual or perceived race, color, religion, national origin, sexual orientation, gender, or disability" of the victim.

The sacred scriptures of many different religious traditions speak with dramatic unanimity on the subject of intolerance. Everyone in this society should enjoy the strongest possible guarantee of freedom from attacks motivated by bigotry. If we aspire to be true to the prophetic core of our religions, we cannot condemn hate and then sit idly by while it destroys our communities. We believe that religion and government must work together to create a society in which diverse people are safe as well as free.

Again, we urge you to co-sponsor the LLEHCPA. If there is anything that we at The Interfaith Alliance can do to assist you in this important matter, please do not hesitate to contact Preetmohan Singh, Deputy Director of Public Policy, at 202-639-6370.

Sincerely,

Welton Gaddy

Rev. Dr. C. Welton Gaddy
President, The Interfaith Alliance
Pastor of Preaching and Worship, North Minster Baptist Church (Monroe, LA)

American Jewish Committee
Office of Government and International Affairs
1156 Fifteenth Street, N.W., Washington, D.C. 20005 www.ajc.org 202-785-4200 Fax 202-785-4115 E-mail ogia@ajc.org

February 23, 2007

Dear Representative:

I write on behalf of the American Jewish Committee, a national organization with more than 175,000 members and supporters represented by 33 regional chapters, to urge you to support the Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEHCPA). This bill would strengthen the efficacy of our law enforcement system by promoting increased cooperation between local, state and federal authorities to ensure that hate crimes offenders are brought to justice.

Hate crimes pose a serious threat to our nation's security and the values upon which this country was founded: in 2005, there were 7,163 hate crimes reported to law enforcement officials. This legislation would help curb such occurrences by broadening federal hate crimes laws to cover incidents where the defendant causes or attempts to cause injury based on the victim's race, color, religion, national origin, sexual orientation, gender, gender identity or disability status. Current federal law does not provide authority for involvement in these cases at all. While we believe that states should continue to play the primary role in prosecuting violent hate crimes, this legislation will better position federal officials to assist state and local authorities in responding to such offenses and amend federal law to facilitate the investigation and prosecution of violent, bias-motivated crimes.

We urge you to support and cosponsor this bill as an important initiative to deter brutal acts of aggression.

Thank you for considering our views on this important matter.

Respectfully,

Richard T. Foltin
Legislative Director and Counsel

JCPA

JEWISH COUNCIL
FOR PUBLIC AFFAIRS

March 1, 2007

Dear Representative:

On behalf of the Jewish Council for Public Affairs (JCPA), we are writing to urge you to sign on as an co-sponsor of the Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEHCPA) being introduced by Representatives John Conyers (D-MI), Mark Kirk (R-IL), Barney Frank (D-MA), Christopher Shays (R-CT), Tammy Baldwin (D-WI), Ileana Ros-Lehtinen (R-FL), Jerrold Nadler (D-NY) and Mary Bono (R-CA). The JCPA is the American Jewish Community's network of 13 national and 125 local public affairs and community relations organizations. Our member agencies work with government representatives, the media, and a wide array of religious, ethnic, and civic organizations to address a broad range of public policy concerns.

The LLEHCPA would remove the current requirement that a hate crime be committed while the victim is engaged in a specific federally-protected activity in order to be prosecuted and would expand federal hate crime law to include acts motivated by the victim's actual or perceived sexual orientation, gender identity, gender, or disability. In addition the LLEHCPA would strengthen the federal government's ability to investigate and prosecute hate crimes. The JCPA believes that while states should continue to play the primary role in the prosecutions of hate crime violence, the federal government must be able to address those cases which local authorities are either unable or unwilling to pursue.

Hate Crimes are deeply disturbing and have profound effects in the community. The Jewish Community is sensitive to these concerns. Our own history has made us acutely aware of the impact and devastation caused by these bias motivated crimes. No community should face these atrocities. For example, in 1999, the attack on the North Valley Jewish Community Center in Granada Hills, California sent shock waves throughout the entire American Jewish community: this was not a random shooting in Los Angeles, it was a deliberate attack against Jews in the United States. Last year, the Jewish Federation Building in Seattle was attacked by gunman killing 1woman and wounding another 5 people. Again, this was a purposeful and deliberate attack.

The LLEHPC will send a clear message that crimes motivated by prejudice will not be tolerated in our society. Bias-motivated crimes committed against any individual hurt not only that person but also chip away at the very pillars of liberty, tolerance and dignity that support American democracy.

We again urge you to become a co-sponsor of this important legislation by calling Keenan Keller with Representative Conyers' Judiciary staff (225-6906).

Sincerely,

Hadar Susskind
Washington Director

AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

April 12, 2007

Dear Member of Congress:

On behalf of the more than 100,000 bipartisan members of the American Association of University Women, we urge you to support the **Local Law Enforcement Hate Crimes Prevention Act**. Sponsored by Reps. John Conyers (D-MI) and Mark Kirk (R-IL) and Senators Edward Kennedy (D-MA) and Gordon Smith (R-OR), this critical piece of legislation will provide local police and sheriff's departments with vital federal resources to address hate violence. Hate crimes are serious, well-documented problems that remain inadequately prosecuted and recognized. Through this legislation, AAUW urges Congress to send a clear signal that hate-motivated violence carried out against any individual will not be tolerated.

While current law covers hate crimes motivated by a person's race, color, religion, or national origin, it is only applicable if the crime is committed while the victim is engaged in specific activities, such as serving on a jury, attending public school, applying for employment, or voting. As a result, the federal law does not reach many cases where individuals, motivated by hate, kill or injure others.

This important bill would strengthen the federal response to hate crimes by giving the U.S. Department of Justice the power to investigate and prosecute bias motivated violence where the perpetrator has selected the victim because of the person's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability. AAUW believes that while states should continue to play the primary role in the prosecution of hate crime violence, the federal government must be able to address cases that local authorities are either unable or unwilling to investigate and prosecute. The measure also provides grants to state and local communities to combat violent crimes committed by juveniles, train law enforcement officers, or to assist in state and local investigations and prosecutions of bias motivated crimes.

Once again, AAUW urges you to support the **Local Law Enforcement Hate Crimes Prevention Act**. If you have any questions, please contact me at 202/785-7793, or Tracy Sherman, Government Relations Manager, at 202/785-7730. Votes associated with these issues may be included in the AAUW Congressional Voting Record for the 110th Congress.

Sincerely,

Lisa M. Maatz
Director, Public Policy and Government Relations

1111 SIXTEENTH ST. NW, WASHINGTON, DC 20036 202/785-7700 FAX 202.872-1425
email: info@aauw.org http://www.aauw.org

JAPANESE AMERICAN CITIZENS LEAGUE
1001 Connecticut Avenue, NW • Suite 730 • Washington, DC • 20036
Ph: (202) 223-1240 • Fax: (202) 296-8082 • E-mail: dc@jacl.org

February 13, 2007

Dear Representative:

On behalf of the Japanese American Citizens' League (JACL), we urge you to cosponsor the Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEHCPA). In the past many people from the Asian American community have been and are still victims of hate crimes each year. According to the FBI in 2005, 54.7 percent of hate crimes were racially motivated. This legislation will strengthen existing federal hate crime laws.

Only applicable to bias-motivated violent crimes, this legislation will not affect lawful public speech, preaching, or writing. What it will do is give local law enforcement officials tools to combat violent, bias-motivated crimes. It will authorize the Department of Justice to investigate and prosecute certain bias-motivated crimes based on the victim's actual or perceived sexual orientation, gender, gender identity or disability.

Hate crimes create responses that do not only impact the victims, but also impacts communities and neighborhoods. This legislation would increase public education and awareness, and encourage Americans to report hate crimes. Federal support will ensure biased-motivated violence is effectively investigated and prosecuted.

As of now, only thirty-one states and the District of Columbia include sexual orientation-based crimes in their hate crimes statutes and coverage for disability-based crimes. The LLEHCPA would increase protection for victims of hate crimes based on sexual orientation, gender, gender identity, or disability. The JACL would like to join with you to ensure equal rights for all, and equally protected under the law.

The Local Law Enforcement Hate Crimes Prevention Act of 2007 is one of our organization's top legislative priorities for the 110th Congress.

Sincerely,

Floyd Mori
National Director
Japanese American Citizens League

PEOPLE FOR THE AMERICAN WAY

February 14, 2007

United States House of Representatives
Washington, DC 20515

Dear Member of Congress:

On behalf of the more than 1,000,000 members and activists of People For the American Way (PFAW), we urge you to co-sponsor the Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEHCPA), which will soon be introduced in the House by Representatives John Conyers, Jr. and Mark Steven Kirk.

Hate crimes legislation is needed to strengthen and close loopholes in current law and is supported overwhelmingly by the civil rights community, as well as by religious and law enforcement organizations. As we engage in actions across the world to protect the human rights of all individuals, it is imperative that we continue to protect those same rights of all Americans here at home.

This legislation would strengthen existing federal law in two very important ways. First, it removes the requirement that victims of violent bias-motivated crimes be engaged in a federally protected activity (such as voting) when the crime is committed – thereby making it easier for federal authorities to prosecute or assist local authorities in prosecuting hate crimes. Second, the bill expands the definition of hate crimes to include those motivated by the gender, disability, sexual orientation, or gender identity of the victim.

Because the federal government's jurisdiction under the bill is limited to the most serious violent crimes, state and local authorities will continue to prosecute most hate crimes – as they do now. However, the bill provides for important backup where state and local authorities cannot or will not act, and allows federal authorities to assist in local prosecutions to ensure that justice is served. To ensure appropriate restraint at the federal level, the Attorney General or his designee must approve all federal hate crime prosecutions and consult with state and local law enforcement officials before undertaking prosecution against any defendant.

There is strong bipartisan support for this legislation, as demonstrated by its passage as an amendment (House Amendment 544 to the Child Safety Act (H.R. 3132)) in the 109th Congress by a vote of 223-199.

Please co-sponsor this legislation and support its enactment into law this year. If you have questions or would like additional information, please contact Gregg Haifley, Deputy Director of Public Policy, at (202) 467-2366. To have your name included as a co-sponsor when LLEHCPA is introduced in the coming weeks, please contact Keenan Keller with Mr. Conyers' office (225-2825) or Richard Goldberg with Mr. Kirk's office (225-4835).

Sincerely,

Ralph G. Neas
President

Tanya Clay House
Director, Public Policy

2000 M Street, NW ♦ Suite 400 ♦ Washington, DC 20036
Telephone 202.467.4999 ♦ Fax 202.293.2672 ♦ E-mail pfaw@pfaw.org ♦ Web site http://www.pfaw.org

Religious Action Center
of Reform Judaism

The Religious Action Center pursues social justice and religious liberty by mobilizing the American Jewish community and serving as its advocate in the nation's capital.

Rabbi David Saperstein
Director and Counsel

Mark J. Pelavin
Associate Director

Jane Wishner
Chair
Commission on Social
Action of Reform Judaism

Rabbi Marla J. Feldman
Director
Commission on Social
Action of Reform Judaism

The Religious Action Center operates under the auspicies of the Commission on Social Action of Reform Judaism, a joint instrumentality of the Central Conference of American Rabbis and the Union for Reform Judaism with its affiliates:

American Conference of Cantors

Association of Reform Zionists of America

Canadian Association of Reform Zionists

Early Childhood Educators of Reform Judaism

National Association of Temple Administrators

National Association of Temple Educators

North American Federation of Temple Brotherhoods

North American Federation of Temple Youth

Program Directors of Reform Judaism

Women of Reform Judaism

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2027 Massachusetts Avenue, NW
at Kivie Kaplan Way
Washington, DC 20036
202.387.2800
Fax: 202.667.9070
E-mail: rac@urj.org
Visit our website at www.rac.org

February 8, 2007

Dear Representative,

On behalf of the Union for Reform Judaism, whose more than 900 congregations across North America encompass 1.5 million Reform Jews, I urge you to co-sponsor the Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEHCPA).

All violent crimes are reprehensible, but the damage done by hate crimes cannot be measured solely in terms of physical injury or dollars and cents. Hate crimes rend the fabric of our society and fragment communities; they target a whole group of people, not just the individual victim. By providing new authority for federal officials to investigate and prosecute cases in which the violence occurs because of the victim's real or perceived sexual orientation, gender identity, gender, or disability, the LLEHCPA will significantly strengthen the federal response to these horrific crimes.

This legislation only applies to bias-motivated crimes, and will not affect lawful public speech or preaching in any way. States will continue to play the primary role in prosecuting bias-motivated violence, but the LLEHCPA will allow the federal government to intervene in cases where local authorities are either unable or unwilling to investigate and prosecute a criminal act as a hate crime.

Studies demonstrate that gay, lesbian, transgender, and disabled persons face a significantly increased risk of violence and harassment based solely on these immutable characteristics. This long-overdue legislation would rightly classify violence based on sexual orientation, gender identity, and disability as a hate crime under federal statue. We cannot allow another Congress to slip by without enactment of the Local Law Enforcement Hate Crimes Prevention Act

As Jews, we cherish the biblical commandment found in Leviticus 19:17: "You shall not hate another in your heart." We know all too well the dangers of unchecked persecution and of failing to recognize hate crimes for what they are: acts designed to victimize an entire community. We also take to heart the commandment "You may not stand idly by when your neighbor's blood is being shed" (Leviticus 19:16). Jewish tradition consistently teaches the importance of tolerance

and the acceptance of others. Inasmuch as we value the pursuit of justice, we must actively work to improve, open, and make safer our communities.

This bill has come far too close to becoming law for far too long. The Local Law Enforcement Hate Crimes Prevention Act of 2007 is one of our organization's top legislative priorities for the 110th Congress. I urge you to co-sponsor this legislation.

Sincerely,

Rabbi David Saperstein
Director and Counsel

Unitarian Universalist Association of Congregations
Washington Office for Advocacy
1320 18th Street, Suite 300B Washington, DC 20036
(202) 296-4672 x15 fax (202) 296-4673
rkeithan@uua.org www.uua.org/uuawo

Rob Keithan
Director

February 15, 2007

Dear Representative:

On behalf of the over 1050 congregations that make up the Unitarian Universalist Association, I urge you to support the Local Law Enforcement Hate Crime Prevention Act of 2007. The Unitarian Universalist Association is a liberal religious denomination founded on seven principles and purposes, the first of which is the inherent worth and dignity of every person. With this first principle as a foundation, the UUA has long supported anti-hate crime legislation, as hate crimes especially rend the fabric of our society because they are committed to cause fear in a whole community, and intended to send a message that an individual and "their kind" will not be tolerated, many times leaving the victim and others in their group feeling isolated, vulnerable and unprotected. This legislation is a prudent, yet powerful step towards ending this bias-driven violence.

Although no law will stop hate crimes altogether, the Unitarian Universalist Association believes that Congress has a responsibility to act immediately on those measures which would help prevent at least some of them from occurring. The passage of this bill would send a clear message to the nation that violence of this sort will not be tolerated. It would also give law enforcement agencies the tools they need to investigate these awful acts.

A broad coalition of civil rights and law enforcement groups support the Local Law Enforcement Hate Crime Prevention Act. The Unitarian Universalist Association of Congregations is among them because our highest policy-making body, the General Assembly, has spoken out countless times against discrimination on the basis of gender, disability, race, religion, and sexual orientation, and in most cases has called for greater government action. In many communities, our congregations have been key players in responding to hatred and hate violence.

I urge you to support Local Law Enforcement Hate Crime Prevention Act. This Congress has a unique opportunity to stand united against one of the worst forms of oppression, violence based on identity.

In Faith,

Robert C. Keithan, Director

PFLAG

February 27, 2007

Dear Legislator,

On behalf of more than 200,000 members and supporters of **Parents, Families and Friends of Lesbians and Gays (PFLAG)**, I am writing to request your support for **H.R. 1000 the Local Law Enforcement Enhancement Act (LLEEA)**. PFLAG members and supporters are committed to making sure that our children and loved ones are protected from bias-motivated crimes. We urge you to stop allowing crimes against our gay, lesbian, bisexual and transgender (GLBT) loved ones to go unrecognized.

LLEEA would expand current federal law to cover crimes motivated by hatred for ones gender, sexual orientation, gender identity or disability. LLEEA would also expand federal jurisdiction over hate crimes and by providing state and local law enforcement with training and federal assistance to prosecute hate crimes. LLEEA does not punish thoughts -- it punishes direct actions that are motivated by hatred.

According to the FBI's 2005 Hate Crimes Statistics report, bias-motivated crimes against the gay, lesbian and bisexual (GLB) community constitute the third largest reported category behind race and religious bias.

These startling numbers only reflect reported crimes. Independent studies and anecdotal evidence suggest that crimes against the GLB and transgender community are significantly unreported. Since many states lack the mechanism to investigate and prosecute bias-motivated crimes against the GLBT community, it is unsurprising that crimes go unreported and criminals go free only to attack our loved ones again.

We hope that you will agree that all Americans, regardless of their sexual orientation or gender identity, deserve a system where law enforcement has the training, assistance and law to prosecute crimes against the people we love and care for. PFLAG members and supporters across the country urge you to co-sponsor and work toward passage of this critical legislation in the 110th Congress.

If there are any questions that you have about this legislation and how our members in your area support this bill, please contact our Assistant Director of Programs, Elizabeth Hampton Brown, at (202) 467-8180 ext. 211 or e-mail ebrown@pflag.org.

Sincerely,

JHuckaby

Jody M. Huckaby
Executive Director
Parents, Families and Friends of Lesbians and Gays (PFLAG)

Parents, Families and Friends of Lesbians and Gays (PFLAG) **You Have a Home in PFLAG**
1726 M Street, NW Suite 400 Washington, DC 20036 **Voice:** (202) 467-8180 **Fax:** (202) 467-8194 **Web:** www.pflag.org

OCA: EMBRACING THE HOPES AND ASPIRATIONS OF ASIAN PACIFIC AMERICANS

February 28, 2007

Dear Representative:

On behalf of OCA (Organization of Chinese Americans), we strongly urge you to cosponsor the Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEHCPA). OCA is a national Asian Pacific American organization dedicated to ensuring social justice for Asian Pacific Americans. In the past many people from the Asian Pacific American (APA) community have been victims of hate crimes and bias incidents, and each year many more become victims. According to the FBI in 2005, 54.7 percent of hate crimes were racially motivated. The 2007 LLEHCPA legislation will strengthen existing federal hate crime laws.

Only applicable to bias-motivated violent crimes, this legislation will not affect lawful public speech, preaching, or writing protected under the first amendment. It will give local law enforcement officials the tools to combat violent, bias-motivated crimes. It will also authorize the Department of Justice to investigate and prosecute certain bias-motivated crimes based on the victim's actual or perceived sexual orientation, gender, gender identity or disability.

Hate crimes impact not only the victims, but also their communities and neighborhoods. This legislation would increase public education and awareness, and encourage Americans to report hate crimes. Federal support will ensure bias-motivated violence is effectively investigated and prosecuted and ensuring hate crime perpetrators do not escape punishment as they did in the 1982 Vincent Chin beating (murder?) in Detroit, MI.

In addition, currently only thirty-one states and the District of Columbia include sexual orientation-based crimes in their hate crimes statutes and coverage for disability-based crimes. The LLEHCPA would increase protection for victims of hate crimes based on sexual orientation, gender, gender identity, or disability. The OCA would like to join with you to ensure equal rights for all, equally protected under the law.

The Local Law Enforcement Hate Crimes Prevention Act of 2007 is one of our organization's top legislative priorities for the 110th Congress.

Sincerely,

Michael Lin
Executive Director

Founded in 1973 as the Organization of Chinese Americans, OCA is a national organization dedicated to advancing the social, political and economic well-being of Asian Pacific Americans in the United States.

1322 18th Street, NW, Washington, D.C. 20036 • Tel: (202) 223-5500 • Fax: (202) 296-0540 • Website www.ocanational.org • Email: oca@ocanatl.org

NATIONAL CENTER for TRANSGENDER EQUALITY

February 6, 2006

By FAX Machine

Dear Representative:

On behalf of the members and constituents of the National Center for Transgender Equality (NCTE) we are writing to urge you to cosponsor the Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEHCPA). This legislation is a critically important response to the epidemic of violence transgender people face all across the United States because of their gender identity.

For the last few years, on average approximately one transgender person has been murdered each month simply for being who they are. We face thousands of other acts of violence on a very regular basis as well.

Bias-motivated crimes merit a priority response because of their special impact on the victims. Individual victims certainly feel the pain, but their communities also are hurt as everyone mourns the loss and fears for their own safety.

This legislation will provide assistance to state and local law enforcement agencies to combat hate crimes and amend federal law to facilitate the investigation and prosecution of violent, bias-motivated crimes. In addition, the bill will authorize the Department of Justice to investigate and prosecute certain bias-motivated crimes based on the victim's actual or perceived sexual orientation, gender, gender identity, or disability. Current federal law does not provide authority for involvement in these cases at all.

Importantly, this legislation only applies to bias-motivated violent crimes. It will not affect lawful public speech, preaching, or writing in any way. In fact, the legislation includes an explicit First Amendment free speech protection for the accused.

According to the FBI, over 7,000 hate crimes were reported to law enforcement officials in 2005. State and local authorities investigate and prosecute the overwhelming majority of these hate crime cases -- and will continue to do so after the LLEHCPA is enacted. The LLEHCPA, however, would provide a necessary backstop to state and local enforcement by permitting federal authorities to provide assistance in these investigations – and by allowing federal prosecutions when state and local authorities are unable or unwilling to act.

The Local Law Enforcement Hate Crimes Prevention Act of 2007 is one of our organization's top three legislative priorities for the 110th Congress.

We urge you to cosponsor this important legislation.

Sincerely,

Mara Keisling
Executive Director

1325 Massachusetts Ave. NW
Suite 700
Washington, DC 20005

202.903.0112(V)
202.393.2241(F)
www.NCTEquality.org

National Organization for Women

March 9, 2007

Dear Representative:

The National Organization for Women, representing more than 500,000 contributing members across the country with many in your Congressional district, supports the Local Law Enforcement Hate Crimes Prevention Act to prevent and penalize bias crimes. The bill, sponsored by John Conyers (D-MI) and Mark Kirk (R-IL) will be introduced sometime this month and we hope that you will add your name as an original co-sponsor. If you have already added your name as a sponsor, we thank you for your support.

Congress has spent over a decade reviewing and discussing this legislation. Panels and debates and hearings have been held, advocates and constituents have raised their voices in support of this bill and just last year it passed with bipartisan support as H. Amendment 544 to the Child Safety Act (H.R. 3132) by a vote of 223 – 199. **We cannot continue to delay the passage of this important federal civil rights legislation because people's safety and lives are at stake.**

Passage of this legislation is especially important for the girls and women of this nation. NOW activists all across the country have been supporting the expansion of this bias crimes legislation since its inception. The bill extends existing federal hate crimes laws beyond the narrow scope of protected federal activities, such as voting, and also includes violent crimes committed on the basis of actual or perceived gender, sexual orientation, disability and gender identity.

And, our members know first hand how vicious crimes of hate can affect our lives. We know that hate crimes are more than individual assaults – they send shock waves and fear throughout a whole community and segments of our diverse population. Hate violence is also a message crime and the message is: "know your place" and "your kind is not welcome here." Girls' and women's lives are restricted and often ruined by the fear as well as the reality of hate crimes, be they based on our religion, race, gender identity or just because we are women.

We ask you to be a leader who shares with us the vision that everyone should be free from hate violence, regardless of their race, religion, national origin or if they are women, people with disabilities, lesbian, gay, bisexual or transgender. The Local Law Enforcement Hate Crimes Prevention Act of 2007 is an important first step in protecting vulnerable individuals and making our communities safe. Please sponsor and support this bill

To be a cosponsor of this legislation, or for more information, please contact Keenan Keller with Rep. Conyers (225-2825) or Richard Goldberg with Rep. Kirk (225-4835).

Sincerely,

Kim A Gandy

National President

1100 H Street, NW • Third Floor • Washington, DC 20005 • (202) 628-8669 • Fax (202) 785-8576
website: www.now.org • email: now@now.org

NATIONAL ASSOCIATION OF
LESBIAN, GAY, BISEXUAL & TRANSGENDER COMMUNITY CENTERS

February 9, 2007

Dear Representative:

On behalf of The National Association of Lesbian, Gay, Bisexual and Transgender Community Centers (NALGBTCC) and the community centers we represent across the country, I urge you to co-sponsor the Local Law Enforcement Hate Crimes Prevention Act of 2007.

This legislation will provide assistance to state and local law enforcement agencies to combat hate crimes and amend federal law to facilitate the investigation and prosecution of violent, bias-motivated crimes. In addition, the bill will authorize the Department of Justice to investigate and prosecute certain bias-motivated crimes based on the victim's actual or perceived sexual orientation, gender, gender identity or disability. Current federal law does not provide authority for involvement in these cases.

NALGBTCC was founded in 1994 as a member-based coalition to support the development of strong, sustainable lesbian, gay, bisexual and transgender (LGBT) community centers. There are over 150 LGBT community centers in 42 states and the District of Columbia. These centers serve a vital and multi-faceted function in their local communities and are often one of the first points of contact for someone who is a victim of a hate crime. At least 1.5 million LGBT people benefit from the culturally competent social services and other programs offered through these critical community-based organizations, which points to the fundamentally important roll community centers play in assisting victims of hate crimes.

In 2005, law enforcement officials reported 1,763 hate crimes, 13.8 percent because of a bias against a particular sexual orientation. As of May 2005, only 32 states and DC had laws that included sexual orientation and only 10 states and DC included gender identity. The lack of explicit inclusion of sexual orientation and gender identity in all states has resulted in severe under-reporting of LGBT hate crimes.

The Local Law Enforcement Hate Crimes Prevention Act of 2007 is of the utmost importance to LGBT individuals across the country. We urge you to become a co-sponsor.

Sincerely,

Terry M. Stone

Terry M. Stone
Executive Director

1325 Massachusetts Avenue, NW
Suite 600
Washington, DC 20005
202-824-0450 • 202-824-0453 Fax
www.lgbtcenters.org

GLSEN®

February 16, 2007

Dear Member of Congress:

GLSEN – the Gay, Lesbian and Straight Education Network – urges you to support current efforts to pass the Local Law Enforcement Hate Crimes Act (LLEHC) of 2007 and to sign on as an original co-sponsor to the LLEHC. The bill, which will be introduced by Reps. John Conyers and Mark Kirk in the coming weeks, would substantially broaden federal hate crime law. It would expand current hate crime coverage beyond race, religion and national origin, to include sexual orientation, gender, gender identity and disability.

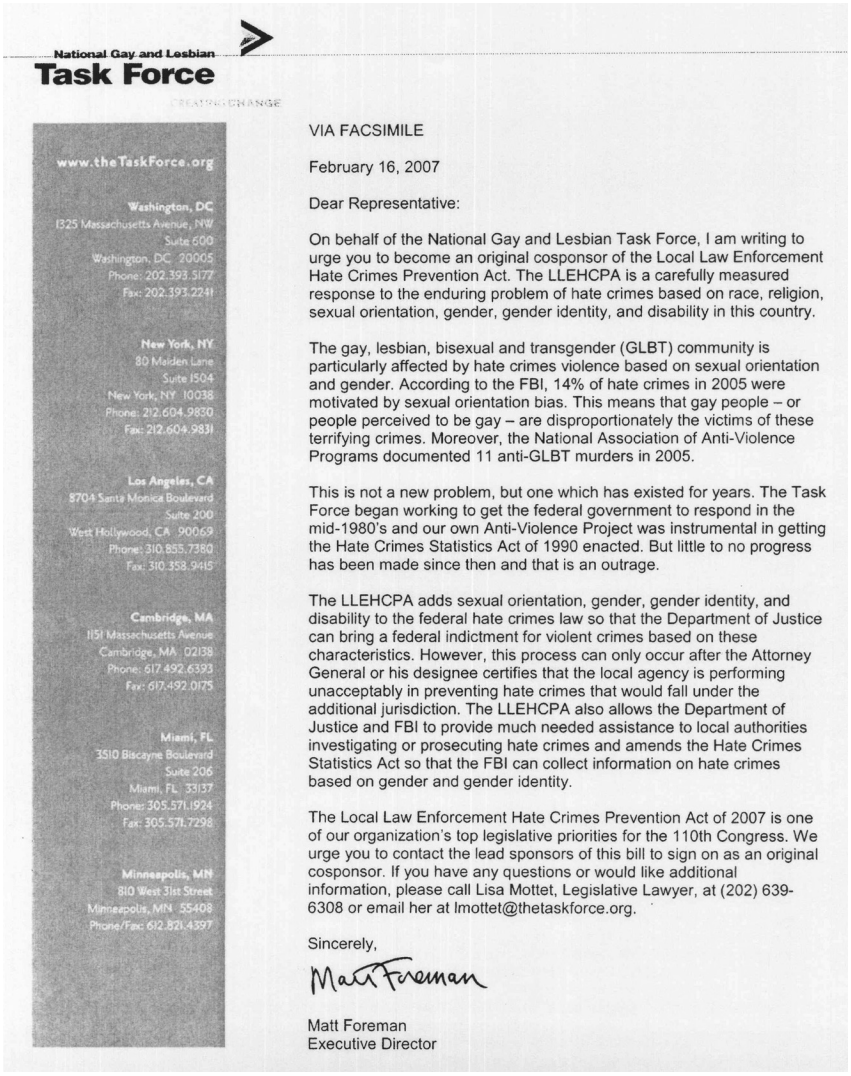
GLSEN is particularly hopeful that this legislation will pass because we know that students are not immune from these kind of hateful attacks. A recent study conducted by Harris Interactive on behalf of GLSEN entitled "From Teasing to Torment" documented that three percent of all students nationwide have experienced physical assault because of their gender, another three percent of all students experienced physical assault because of their gender expression, another three percent of all students experienced physical assault because of their sexual orientation, and still another three percent experienced physical assault because of their disability. Among self-identified lesbian, gay, bisexual and transgender students, eight percent reported being physically assaulted because of their gender expression and another eight percent reported physical assault because of their sexual orientation.

Since 1968, the federal government has had very limited jurisdiction to prosecute cases when state and local law enforcement officials cannot or will not. The LLEHCA will not only strengthen the current legislation by broadening the types of violent crime that it covers, it will expand the protected categories to include hate crimes based on sexual orientation,, gender identity, and disability.

GLSEN believes that Congress must do everything it can to empower the federal government to assist in local hate crime prosecutions and to protect all Americans from violent crimes based on hate and bigotry. Should you wish additional information about GLSEN's position on hate crimes, please contact Neil Bomberg, Public Policy Director at 202 347 7780 ext. 203 or at nbomberg@glsen.org. To have your name included as an original co-sponsor when LLEHCPA is introduced in the coming weeks, please contact Keenan Keller with Mr. Conyers' office (225-2825) or Richard Goldberg with Mr. Kirk's office (225-4835).

Sincerely yours,

Kevin Jennings, Executive Director
90 Broad Street, 2nd Floor
New York, New York 10004
212-727-0135
kjennings@glsen.org



National Gay and Lesbian Task Force

CREATING CHANGE

www.theTaskForce.org

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Phone: 305.571.1924
Fax: 305.571.7298

Minneapolis, MN
810 West 31st Street
Minneapolis, MN 55408
Phone/Fax: 612.821.4397

VIA FACSIMILE

February 16, 2007

Dear Representative:

On behalf of the National Gay and Lesbian Task Force, I am writing to urge you to become an original cosponsor of the Local Law Enforcement Hate Crimes Prevention Act. The LLEHCPA is a carefully measured response to the enduring problem of hate crimes based on race, religion, sexual orientation, gender, gender identity, and disability in this country.

The gay, lesbian, bisexual and transgender (GLBT) community is particularly affected by hate crimes violence based on sexual orientation and gender. According to the FBI, 14% of hate crimes in 2005 were motivated by sexual orientation bias. This means that gay people – or people perceived to be gay – are disproportionately the victims of these terrifying crimes. Moreover, the National Association of Anti-Violence Programs documented 11 anti-GLBT murders in 2005.

This is not a new problem, but one which has existed for years. The Task Force began working to get the federal government to respond in the mid-1980's and our own Anti-Violence Project was instrumental in getting the Hate Crimes Statistics Act of 1990 enacted. But little to no progress has been made since then and that is an outrage.

The LLEHCPA adds sexual orientation, gender, gender identity, and disability to the federal hate crimes law so that the Department of Justice can bring a federal indictment for violent crimes based on these characteristics. However, this process can only occur after the Attorney General or his designee certifies that the local agency is performing unacceptably in preventing hate crimes that would fall under the additional jurisdiction. The LLEHCPA also allows the Department of Justice and FBI to provide much needed assistance to local authorities investigating or prosecuting hate crimes and amends the Hate Crimes Statistics Act so that the FBI can collect information on hate crimes based on gender and gender identity.

The Local Law Enforcement Hate Crimes Prevention Act of 2007 is one of our organization's top legislative priorities for the 110th Congress. We urge you to contact the lead sponsors of this bill to sign on as an original cosponsor. If you have any questions or would like additional information, please call Lisa Mottet, Legislative Lawyer, at (202) 639-6308 or email her at lmottet@thetaskforce.org.

Sincerely,

Matt Foreman

Matt Foreman
Executive Director

ADC

American-Arab Anti-Discrimination Committee

www.adc.org

1732 Wisconsin Ave., NW
Washington, DC 20007
Tel: 202-244-2990
Fax: 202-244-7968
Email: adc@adc.org

February 12, 2007

By FAX Machine

Dear Representative:

The American-Arab Anti-Discrimination Committee (ADC) urges you to cosponsor H.R. 1000, the Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEHCPA). LLEHCPA would provide increased protection for all Americans, including Arab-Americans, from being the victims of hate crimes.

Arab-Americans have experienced a surge in hate crimes directed against them over the past several years. Immediately following the September 11 terrorist attacks, the FBI documented a 1,600 percent increase in hate crimes against those perceived to be Muslim or Arab and a 130 percent increase in incidents directed at individuals on the basis of ethnicity or national origin. On a daily basis ADC continues to be contacted by members of our community seeking support following hate crime incidents. We are now calling upon Congress to send the message to all Americans that the federal government and law enforcement officials are committed to protecting all citizens from hate violence.

LLEHCPA will provide assistance to state and local law enforcement agencies to combat hate crimes and amend federal law to facilitate the investigation and prosecution of violent, bias-motivated crimes.

This legislation only applies to bias-motivated violent crimes. It will not affect lawful public speech, preaching, or writing in any way. In fact, the legislation includes an explicit First Amendment free speech protection for the accused.

The Local Law Enforcement Hate Crimes Prevention Act of 2007 is one of our organization's top legislative priorities for the 110th Congress.

The American-Arab Anti-Discrimination Committee urges you to cosponsor this important legislation.

Sincerely,

Kareem Shora, JD, LLM
National Executive Director

Christine Gleichert
Legislative Director

GENDER PUBLIC ADVOCACY COALITION

Gender PAC

March 15, 2007

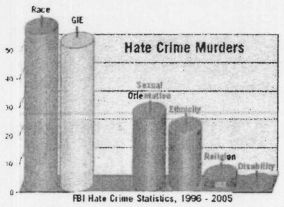
Dear Representative,

The Gender Public Advocacy Coalition is writing to urge you to co-sponsor the Local Law Enforcement Hate Crimes Prevention Act of 2007 (LLEHCPA). This bill will provide much-needed assistance to state and local law enforcement agencies in the investigation and tracking of violent, bias-motivated crimes; as well as permit that crimes motivated by a victim's gender identity be investigated as hate crimes.

Our recent human rights report, *50 Under 30: Masculinity and the War on America's Youth*, documents a murderous tide of under-reported and under-solved violence that is claiming the lives of gender non-conforming youth and young adults ages 30 and under, and the dangerous indifference of some law enforcement authorities.

According to *50 Under 30,* **more than 50 young Americans have been killed since 1995 because of their gender identity or expression**. Half (54%) of these murders remain unsolved. And while those murders classified as hate crimes were about one-and-a-half times more likely to be solved, **nearly three-quarters (72%) were not classified as hate crimes – often in the face of clear evidence to the contrary**.

These tragic murders are part of an even larger problem. Since 1991, the FBI has documented over 113,000 hate crimes. In 2005 alone, the FBI reported 7,163 criminal incidents that were directed against an individual because of their race, religion, sexual orientation, national origin, or disability.



FBI Hate Crime Statistics, 1996 - 2005

Disturbingly, while the FBI is not currently mandated to track crimes based on "gender identity or expression," based on our research, were these crimes tracked they would have constituted the second-largest group of hate crime murders since 1996. (The complete *50 Under 30* report can be viewed online at www.50under30.org.)

LLEHCPA will help remedy this by giving the federal government the authority to address cases in which local authorities are unable or unwilling to investigate and prosecute bias-motivated crimes, and mandating that the FBI collect information from local law enforcement about these crimes.

Inclusive hate crimes legislation has seen some congressional support in recent years – including an identical bill that passed in the House with a bipartisan majority of 223-199 in 2005. And according to a recent national survey by Hart Research, such legislation is supported by a large majority (73%) of voters. **We believe that it is time for Congress to publicly reaffirm its commitment to protect all Americans from bias-motivated violence.**

The epidemic of gender-based violence being waged against America's youth must be stopped. LLEHCPA is as a crucial step in building an America where hate-motivated crimes are deemed intolerable and we ask you to support its passage. Please consider co-sponsoring the Local Law Enforcement Enhancement Hate Crimes Prevention Act of 2007.

Thank you for your time and attention to this vital matter.

Respectfully,

Riki Wilchins
Executive Director

CENTER FOR THE STUDY OF HATE & EXTREMISM

April 9, 2007

Dear Congressperson:

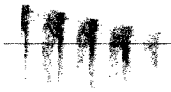
The Center for the Study of Hate & Extremism at California State University, San Bernardino respectfully seeks your support for the enactment of the Local Law Enforcement Hate Crime Prevention Act (LLEHPA) pending before Congress. We are a university based, internationally known, non-partisan research and policy organization.

Research by our Center and others indicates that hate crimes are a qualitatively unique form of victimization with specific risks and harms to both victims and society. While we believe that criminal law enforcement should generally be left to state and local authorities, the nature and history of these offenses and their far reaching impact make federal legislation particularly appropriate. Existing federal law and the laws of various states have anachronistic exclusions that obstruct law enforcement and prevent many classes of people in various circumstances from being covered, The LLEHPA remedies these defects. Additionally, the LLEHP A allows for federal assistance for local authorities who often have inadequate resources. As a former police officer, attorney, and educator I have for twenty years sought these proposed changes to our federal law. I am pleased to join over 210 other organizations in urging you to enact this effective and constitutional bill. This law will help protect all Americans from the scourge of discriminatory violence which still afflicts tens of thousands throughout our nation every year.

Thank you for your attention to this matter. Please do not hesitate to contact me if I can be of further assistance at (909) 537-7711 or blevin8@aol.com.

Sincerely,

Prof. Brian Levin
Director, Center for the Study of Hate & Extremism
California State University, San Bernardino



Local Law Enforcement Hate Crime Prevention Act of 2007

LAW ENFORCEMENT SUPPORT FOR THIS LEGISLATION

This legislation has received bipartisan majority support in Congress. In the last session of Congress, on September 14, 2005, the House of Representatives approved the measure as an amendment to the Children's Safety Act by a vote of 223-199. The Senate has approved the bill on two occasions since 2000, most recently in June, 2004 by a vote of 65-33. Unfortunately, in the past, the House leadership has acted to block approval of this legislation.

The measure also enjoys the support of over 210 civil rights, professional, civic, and religious groups, 30 state Attorneys General, former Attorney General Dick Thornburgh, and a number of the most important national law enforcement organizations, including:

- Federal Law Enforcement Officers Association
- Hispanic American Police Command Officers Association
- Hispanic National Law Enforcement Association
- International Association of Chiefs of Police
- International Brotherhood of Police Officers
- Major Cities Chiefs Association
- National Asian Peace Officers Association
- National Black Police Association
- National Center for Women & Policing
- National Coalition of Public Safety Officers
- National District Attorneys Association
- National Latino Police Officers Association
- National Organization of Black Law Enforcement Executives
- National Sheriffs' Association
- Police Executive Research Forum
- Police Foundation

Here's what some of them are saying about the legislation:

Police Executive Research Forum

"This bill is critical to helping local law enforcement effectively address the devastating effects that bias-motivated crimes have on its victims and the communities destabilized by the fear and anger they generate...In the past, PERF has opposed efforts to expand the federal government's authority over traditionally local crimes. However, given the unusual nature of hate crimes and the substantial gaps in state laws, PERF believes in a significant federal role in combating hate crimes."

– Excerpts from letter to Members of Congress from Chuck Wexler, Executive Director, PERF, November 11, 2005.

National Sheriffs' Association

"On behalf of the National Sheriff's Association and the 3,087 sheriffs across the country, I am writing to express our strong support for...the 'Local Law Enforcement Enhancement Act (LLEEA) of 2005'...Unfortunately, there are situations where state and local authorities are unable to properly investigate these crimes. This legislation overcomes those situations...The NSA and our more than 23,000 members strongly believe passage of the LLEEA will greatly assist state and local law enforcement agencies in investigating and prosecuting hate crimes."

– Excerpts from letters to congressional leadership from Sheriff Edmund M. "Ted" Sexton, Tuscaloosa, Alabama, President, National Sheriffs' Association, November, 17,2005.

Dick Thornburgh, Former U.S. Attorney General

"I would like to express my strong support for the passage of ... the Hate Crimes Prevention Act... From my experiences as a Governor, the Attorney General, and as a parent of a child with a disability, I can attest to the importance of this legislation... Please add my name to the list of supporters for the passage of this important legislation."

– Excerpts from Letter to the Honorable Orrin G. Hatch, Sept. 29, 1998.

International Association of Chiefs of Police

"On behalf of the International Association of Chiefs of Police (IACP), I am writing to inform you of our strong support of the Local Law Enforcement Enhancement Act...The Passage of the Local Law Enforcement Enhancement Act will greatly assist state and local law enforcement agencies in investigating and prosecuting hate crimes. The IACP urges you to support [the Local Law Enforcement Enhancement Act]."

– Excerpts from letter to the Senate from Mary Ann Viverette, IACP President, Gaithersburg, Maryland, December 6, 2005

Albany County Sheriff's Department

"As you know, last week saw the conclusion of the trial of Aaron McKinney for the murder of Matthew Shepard, a case on which we worked day and night for the last year... We believe justice was served in this case, but not without cost. We have been devastated financially, due to expenses incurred in bringing Matthew's killers to justice. For example, we had to lay off five law enforcement staff. We do not want the federal take over of hate crimes, but communities like ours must be able to call upon the expertise and resources of the federal government. This approach worked very well in Jasper, Texas in the case of James Byrd Jr. Because of the multiple jurisdiction granted by current federal law related to race-based hate crimes, Jasper was able to access approximately $284,000 in federal Byrne grant money. These grants are only available when a federal jurisdictional basis exists. Presently, unlike race, color, religion and national origin, sexual orientation is not covered. We believe this is a grave oversight that needs to be corrected... We respectfully urge you to do everything you can to give law enforcement the tools it needs to fight crime in this country."

– Excerpts from letter to House Speaker Dennis Hastert from Sheriff James Pond and Detective Sergeant Robert DeBree, Albany County Sheriff's Department, Nov. 11, 1999.

Eric Holder, Former U.S. Deputy Attorney General

"The enactment of H.R. 1082 [bill number for Hate Crimes Prevention Act, 106th Congress] would significantly increase the ability of state and federal law enforcement agencies to work together to solve and prevent a wide range of violent crimes committed because of bias based on the race, color, national origin, religion, sexual orientation, gender, or disability of the victim. This bill is a thoughtful, measured response to a critical problem facing our Nation."

– Excerpts from testimony before the House Judiciary Committee hearing on hate crimes, Aug. 4, 1999.

Jeanine Pirro, District Attorney from Westchester County, N.Y.

"The vast majority of criminal prosecutions are brought by local prosecutors... That is the way it should remain... However, there are times when states are unable or unwilling to recognize and address fundamental issues vital to our society. And, when that time comes, the federal government must act. Hate crime is a civil rights issue, and the proper role of the federal government in controlling this menace should mirror federal action in other areas of civil rights... I maintain hope that immediate federal action on this pressing issue will encourage states ... to enact legislation of their own..."

– Excerpts from testimony before the Senate Judiciary Committee, May 11, 1999.

Laramie, Wyoming, Police Department

"When it comes to the families of hate crime victims, Congress needs to also be able to look these people in the eyes and say it is doing all it can. In all honesty, right now they cannot say this. There is much more they can do to assist us in helping these families – if they can only find the political will to do so... Yes, justice was served in the end during the Shepard investigation. But the Albany County Sheriff's office had to furlough five investigators because of soaring costs. If the Local Law Enforcement Enhancement Act were passed, this would never have happened..."

– Excerpts from press statement made by Commander David O'Malley, chief investigator in the murder of Matthew Shepard, Sept. 12, 2000.

National Association of Attorneys General

"We are writing to express our enthusiastic support for the passage of ... the Hate Crimes Prevention Act... Although state and local governments will continue to have the principal responsibility, an expanded federal role in investigating and prosecuting serious forms of hate crimes is critically needed if we are to be successful in addressing and deterring these crimes in our nation. The amendment to 18 U.S.C. Section 245 would provide invaluable tools for the United States Department of Justice and the United States Attorneys to combat hate crimes effectively. Therefore, we strongly urge passage of this important hate crimes legislation."

– Excerpts from letter signed by 31 State Attorneys Generals to Speaker Dennis Hastert, Majority Leader Bill Frist, House Minority Leader Nancy Pelosi and Senate Minority Leader Harry Reid, April, 2006

National Center for Women & Policing

"...I want to assure you of our support for the Hate Crimes Prevention Act... We realize the significance of this important piece of legislation."

– Excerpts from letter from Chief Penny Harrington, Director, National Center for Women & Policing, to Elizabeth Birch, Human Rights Campaign, March 23, 2000.

National District Attorneys Association

"On behalf of the members of the National district Attorneys Association, I am writing to express our organization's support of...the 'Local Law Enforcement Enhancement Act of 2005.'...With local law enforcement and prosecutors investigating and prosecuting approximately 95% of the crimes committed such assistance would certainly provide state and local officials with the necessary tools to address crimes motivated by hate. The National District Attorneys Association supports [the bill] not only because of its proposal to provide additional resources and federal assistance to state and local authorities for the investigation and prosecution of hate crimes but also its recognition of the primacy of state and local jurisdiction over such crimes."

– Excerpts from letter to The Honorable Edward M. Kennedy, April 14, 2006

Police Foundation

"The Police Foundation urges you to support ... [the] Local Law Enforcement Enhancement Act. Hate crimes are extremely debilitating to individuals, groups, and entire communities, and the prevention, investigation, and prosecution of these crimes present important challenges for local law enforcement... This legislation will be of valuable assistance to state and local agencies..."

– Excerpts from letter to Members of Congress from Hubert Williams, Chairman of the Board, Police Foundation, July 26, 2004.

Updated January, 2007

Local Law Enforcement Hate Crime Prevention Act of 2007

LAW ENFORCEMENT SUPPORT FOR THIS LEGISLATION

This legislation has received bipartisan majority support in Congress. In the last session of Congress, on September 14, 2005, the House of Representatives approved the measure as an amendment to the Children's Safety Act by a vote of 233-199. The Senate has approved the bill on two occasions since 2000, most recently in June, 2004 by a vote of 65-33. Unfortunately, in the past, the House leadership has acted to block approval of this legislation.

The measure also enjoys the support of over 210 civil rights, professional, civic, and religious groups, 31 state Attorneys General, former Attorney General Dick Thornburgh, and a number of the most important national law enforcement organizations, including:

- Federal Law Enforcement Officers Association
- Hispanic American Police Command Officers Association
- Hispanic National Law Enforcement Association
- International Association of Chiefs of Police
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- National Asian Peace Officers Association
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- National Center for Women & Policing
- National Coalition of Public Safety Officers
- National District Attorneys Association
- National Latino Police Officers Association
- National Organization of Black Law Enforcement Executives
- National Sheriffs' Association
- Police Executive Research Forum
- Police Foundation

Here's what some of them are saying about the legislation:

Police Executive Research Forum

"This measure is critical to helping law enforcement effectively address the ravaging effects on hate crimes on both the victims of these crimes and the communities destabilized by the fear and anger they generate… In the past, PERF has opposed efforts to expand the federal government's authority over traditionally local crimes. However, given the unusual nature of hate crimes and the substantial gaps in state laws, PERF believes in a significant federal role in combating hate crimes."

– Excerpts from letter to Members of Congress from Chuck Wexler, Executive Director, PERF, July 19, 2004.

National Sheriffs' Association

"On behalf of the more than 22,000 members of the National Sheriffs' Association I am writing to seek your support for … the Local Law Enforcement Enhancement Act [LLEEA]. Unfortunately, there are situations where state and local authorities are unable to properly investigate these crimes. This legislation overcomes those situations… The passage of LLEEA will greatly assist state and local law enforcement agencies in investigating and prosecuting hate crimes."

– Excerpts from letters to congressional leadership from Sheriff Aaron D. Kennard, Salt Lake City, Utah, President, National Sheriffs' Association, July 21, 2004.

Dick Thornburgh, Former U.S. Attorney General

"I would like to express my strong support for the passage of … the Hate Crimes Prevention Act… From my experiences as a Governor, the Attorney General, and as a parent of a child with a disability, I can

attest to the importance of this legislation… Please add my name to the list of supporters for the passage of this important legislation."

– Excerpts from Letter to the Honorable Orrin G. Hatch, Sept. 29, 1998.

International Association of Chiefs of Police

"On behalf of the International Association of Chiefs of Police (IACP), I am writing to urge you to vote in support of … the Local Law Enforcement Enhancement Act… The passage of the Local Law Enforcement Enhancement Act will greatly assist state and local law enforcement agencies in investigating and prosecuting hate crimes. The IACP urges you to vote for [the Local Law Enforcement Enhancement Act]…"

– Excerpts from letter to the Senate from Daniel N. Rosenblatt, IACP Executive Director, Alexandria, Virginia, July 19, 2004

Albany County Sheriff's Department

"As you know, last week saw the conclusion of the trial of Aaron McKinney for the murder of Matthew Shepard, a case on which we worked day and night for the last year… We believe justice was served in this case, but not without cost. We have been devastated financially, due to expenses incurred in bringing Matthew's killers to justice. For example, we had to lay off five law enforcement staff. We do not want the federal take over of hate crimes, but communities like ours must be able to call upon the expertise and resources of the federal government. This approach worked very well in Jasper, Texas in the case of James Byrd Jr. Because of the multiple jurisdiction granted by current federal law related to race-based hate crimes, Jasper was able to access approximately $284,000 in federal Byrne grant money. These grants are only available when a federal jurisdictional basis exists. Presently, unlike race, color, religion and national origin, sexual orientation is not covered. We believe this is a grave oversight that needs to be corrected… We respectfully urge you to do everything you can to give law enforcement the tools it needs to fight crime in this country."

– Excerpts from letter to House Speaker Dennis Hastert from Sheriff James Pond and Detective Sergeant Robert DeBree, Albany County Sheriff's Department, Nov. 11, 1999.

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"The enactment of H.R. 1082 [bill number for Hate Crimes Prevention Act, 106th Congress] would significantly increase the ability of state and federal law enforcement agencies to work together to solve and prevent a wide range of violent crimes committed because of bias based on the race, color, national origin, religion, sexual orientation, gender, or disability of the victim. This bill is a thoughtful, measured response to a critical problem facing our Nation."

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"The vast majority of criminal prosecutions are brought by local prosecutors… That is the way it should remain… However, there are times when states are unable or unwilling to recognize and address fundamental issues vital to our society. And, when that time comes, the federal government must act. Hate crime is a civil rights issue, and the proper role of the federal government in controlling this menace should mirror federal action in other areas of civil rights… I maintain hope that immediate federal action on this pressing issue will encourage states … to enact legislation of their own…"

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Laramie, Wyoming, Police Department

"When it comes to the families of hate crime victims, Congress needs to also be able to look these people in the eyes and say it is doing all it can. In all honesty, right now they cannot say this. There is much more they can do to assist us in helping these families – if they can only find the political will to do so… Yes, justice was served in the end during the Shepard investigation. But the Albany County Sheriff's office had to furlough five investigators because of soaring costs. If the Local Law Enforcement Enhancement Act were passed, this would never have happened…"

– Excerpts from press statement made by Commander David O'Malley, chief investigator in the murder of Matthew Shepard, Sept. 12, 2000.

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"We are writing to express our enthusiastic support for the passage of … the Hate Crimes Prevention Act… Although state and local governments will continue to have the principal responsibility, an expanded federal role in investigating and prosecuting serious forms of hate crimes is critically needed if we are to be successful in addressing and deterring these crimes in our nation. The amendment to 18 U.S.C. Section 245 would provide invaluable tools for the United States Department of Justice and the United States Attorneys to combat hate crimes effectively. Therefore, we strongly urge passage of this important hate crimes legislation."

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National District Attorneys Association

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– Excerpts from letter to The Honorable Edward M. Kennedy, April 14, 2006

Police Foundation

"The Police Foundation urges you to support … [the] Local Law Enforcement Enhancement Act. Hate crimes are extremely debilitating to individuals, groups, and entire communities, and the prevention, investigation, and prosecution of these crimes present important challenges for local law enforcement… This legislation will be of valuable assistance to state and local agencies…"

– Excerpts from letter to Members of Congress from Hubert Williams, Chairman of the Board, Police Foundation, July 26, 2004.

Updated January, 2007

Pacific Justice Institute
PRESS RELEASE

For Immediate Release **August 8, 2006**
Contact: Brad Dacus, President (916) 857-6900

Slavic Christians Demeaned for Free Speech Activities, Urged to Leave U.S.

Sacramento, CA—In the wake of a major news article in Sacramento, the local Slavic Christian community is experiencing an unprecedented wave of hostility and even demands that they return to their home countries.

A front-page article in *The Sacramento Bee* this Sunday reviewed the last few months of tension which began in April when several Slavic students were suspended from two Sacramento-area high schools. The students' offenses: wearing t-shirts during the pro-gay Day of Silence which stated, "Homosexuality is Sin. Jesus Can Set You Free." Since then, the Slavic community has been active in opposing several bills before the state legislature which would greatly increase the level of homosexual propaganda in schools. Pacific Justice Institute represents the suspended students and has been providing counsel for other Slavic speech activities.

In response to Sunday's article, *The Bee*'s online forum has been flooded with derogatory comments toward the Christian Slavic community. A small sampling of comments currently posted by *Bee* readers includes the following: "They can send these bigots back to Russia on the first leaky boat." "If they can't celebrate diversity then they should move." "If these people want to be Americans, they'd better realize what that means. It means accepting us queers." "They should be deported to some place like Cuba, Vietnam, Venzuela, [sic] or China where people havn't [sic] forgotten how to handle insane sects who embrace ideas from the Dark Ages. . . . Hate mongering is not protected speech – it's a crime." Other comments suggest boycotting Slavic businesses and holding Slavic pastors liable for any potential violence that might be directed toward homosexuals.

The visceral reactions to the *Bee* article may stem in part from its omission of reports communicated directly to *Bee* reporters by PJI attorneys that Christian Slavic students have themselves been physically assaulted and threatened—in some cases by teachers—in addition to being cursed and shown obscene gestures, because of their opposition to homosexuality. The article also did not mention several acts of kindness shown toward homosexual activists who have recently begun protesting at Slavic churches.

Brad Dacus, president of Pacific Justice Institute, commented, "The hatred and intolerance shown toward these Slavic Christians for expressing their Biblical beliefs are shocking. Every Bible-believing individual and member of the clergy should note these intimidating tactics and realize they could be next."

Poll question: Please visit our website, www.pacificjustice.org, to respond to our poll question: Should it be a crime to share Bible verses which address homosexuality?

African American Ministers in Action • American Conference of Cantors • American Islamic Congress • American Jewish Committee • Anti-Defamation League • B'nai Brith International • Buddhist Peace Fellowship • Catholics for a Free Choice • Central Conference of American Rabbis • Disciples Justice Action Network • The Episcopal Church • Equal Partners in Faith • Friends Committee on National Legislation • Hadassah, the Women's Zionist Organization of American • Jewish Council for Public Affairs • Jewish Labor Committee • Jewish Reconstructionist Federation • Methodist Federation for Social Action • Moderator's Global Justice Team of Metropolitan Community Churches • National Council of Jewish Women • North American Federation of Temple Youth • Presbyterian Church (USA), Washington Office • Sikh American Legal Defense and Education Fund • The Interfaith Alliance • Union for Reform Judaism • Unitarian Universalist Association of Congregations • United Church of Christ, Justice and Witness Ministries • United Methodist Church, General Board of Church and Society • United Methodist Church, General Commission on Religion and Race • United Synagogue of Conservative Judaism • Women of Reform Judaism

March 2007

Dear Representative,

As representatives of a diverse array of religious communities, we write to urge you to co-sponsor and vote in support of HR 1592, the Local Law Enforcement Hate Crimes Prevention Act (LLEHCPA). In the 109th Congress, the House approved an identical bill on September 14, 2005 as an amendment to H.R. 3132, the Children's Safety Act, with a bipartisan majority of 223-199.

Hate is neither a religious nor American value. The sacred scriptures of many different faith traditions speak with dramatic unanimity on the subject of hate. Crimes motivated by hatred or bigotry are an assault not only upon individual victims' freedoms, but also upon a belief that lies at the core of our diverse faith traditions -- that every human being is created in the image of God. While we recognize that legislation alone cannot remove hatred from the hearts and minds of individuals, the LLEHCPA will serve as a crucial step in building a society where hate-motivated crimes are deemed intolerable.

In 2005, the FBI documented 7,163 hate crimes directed against institutions and individuals because of their race, religion, sexual orientation, national origin, or disability. But these troubling statistics do not speak for themselves – because behind each and every one of these incidents are individuals, families, and communities deeply impacted by these crimes. The LLEHCPA will stream-line the process for the Department of Justice to assist local authorities to investigate and prosecute these cases – and permit federal involvement in cases that occur because of a victim's gender, disability, gender identity or sexual orientation.

Existing federal law is inadequate to address the significant national problem of hate crimes. Not only does current law contain obstacles to effective enforcement, but it also does not provide authority to investigate and prosecute bias crimes based on disability, gender, gender identity or sexual orientation. We are morally obligated to call for laws to protect all Americans from hate-motivated violence.

The LLEHCPA does not in any way violate the First Amendment protections of offenders. Hate crime laws do not restrict speech. Rather, they target only criminal conduct prompted by prejudice. Some critics of the LLEHCPA have erroneously asserted that enactment of the measure would prohibit the lawful expression of one's deeply held religious beliefs. These fears are unfounded. **The LLEHCPA does not punish, nor prohibit in any way, preaching or other expressions of religious belief, name-calling, or even expressions of hatred toward any group. It covers only violent actions that result in death or bodily injury**

Although we believe that state and local governments should continue to have the primary responsibility for investigating and prosecuting hate crimes, an expanded federal role is necessary to ensure adequate and equitable response to these divisive crimes. The federal government must have authority to address those important cases in which local authorities are either unable or unwilling to investigate and prosecute.

Now is the time for Congress to publicly reaffirm its commitment to protect all Americans from such flagrant bias-motivated violence. As people of faith and leaders in the religious community, we are committed to eradicating the egregious hatred and violence which divides our society. We believe that the LLEHCPA is vital to this struggle, and we ask you to support its passage.

Respectfully,

African American Ministers in Action
American Conference of Cantors
American Islamic Congress
American Jewish Committee
Anti-Defamation League
B'nai Brith International
Buddhist Peace Fellowship
Catholics for a Free Choice
Central Conference of American Rabbis
Disciples Justice Action Network
The Episcopal Church
Equal Partners in Faith
Friends Committee on National Legislation

Hadassah, the Women's Zionist Organization of America
Jewish Council for Public Affairs
Jewish Labor Committee
Jewish Reconstructionist Federation
Methodist Federation for Social Action
Moderator's Global Justice Team of Metropolitan Community Churches
National Council of Jewish Women
North American Federation of Temple Youth
Presbyterian Church (SA), Washington Office
Sikh American Legal Defense and Education Fund
The Interfaith Alliance
Union for Reform Judaism
Unitarian Universalist Association of Congregations
United Church of Christ, Justice and Witness Ministries
United Methodist Church, General Board of Church and Society
United Methodist Church, General Commission on Religion and Race
United Synagogue of Conservative Judaism
Women of Reform Judaism

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TYLER CHASE HARPER, a minor, by and through his parents Ron and Cheryl Harper; RON HARPER; CHERYL HARPER, Plaintiffs - Appellants, v. POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM; LINDA VANDERVEEN; PENNY RANFTYLE; STEVE MCMILLAN; ANDY PATAPOW, All Individually and in their official capacity as Members of the Board of the Poway Unified School District; DONALD A. PHILLIPS, Individually, and in his official capacity as Superintendent of the Poway Unified School Disrict; SCOTT FISHER, Individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, Individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, Individually and in his official capacity as Vice Principal of Poway High School; DAVID LEMASTER, Individually and in his official capacity as Teacher of Poway High School; DOES 1 THROUGH 20, INCLUSIVE, Defendants - Appellees.	No. 04-57037 D.C. No. CV-04-01103-JAH OPINION

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted June 6, 2005
Pasadena, California

Filed April 20, 2006

Before: REINHARDT, KOZINSKI, and THOMAS, Circuit Judges.

REINHARDT, Circuit Judge:

May a public high school prohibit students from wearing T-shirts with messages that condemn and denigrate other students on the basis of their sexual orientation? Appellant in this action is a sophomore at Poway High School who was ordered not to wear a T-shirt to school that read, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" handwritten on the front, and "HOMOSEXUALITY IS SHAMEFUL" handwritten on the back. He appeals the district court's order denying his motion for a preliminary injunction. Because he is not likely to succeed on the merits, we affirm the district court's order.

I. Factual Background[1]

Poway High School ("the School") has had a history of conflict among its students over issues of sexual orientation. In 2003, the School permitted a student group called the Gay-Straight Alliance to hold a "Day of Silence" at the School which, in the words of an Assistant Principal, is intended to "teach tolerance of others, particularly those of a different sexual orientation."[2] During the days surrounding the 2003 "Day of Silence,"[3] a series of incidents and altercations occurred on the school campus as a result of anti-homosexual comments that were made by students. One such confrontation required the Principal to separate students physically. According to David LeMaster, a teacher at Poway, several students were suspended as a result of these conflicts. Moreover, a week or so after the "Day of Silence," a group of heterosexual students informally organized a

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[1]These background facts are based on the limited record before us which includes five declarations by school officials, and declarations from Harper, his father, Ron Harper, and a fellow student, Joel Rhine.

[2]In his complaint, Harper alleges that he believes "the true purpose" of the "Day of Silence" was "to endorse, promote and encourage homosexual activity."

[3]On the "Day of Silence," participating students wore duct tape over their mouths to symbolize the silencing effect of intolerance upon gays and lesbians; these students would not speak in class except through a designated representative. Some students wore black T-shirts that said "National Day of Silence" and contained a purple square with a yellow equal sign in the middle. The Gay-Straight Alliance, with the permission of the School, also put up several posters promoting awareness of harassment on the basis of sexual orientation.

"Straight-Pride Day," during which they wore T-shirts which displayed derogatory remarks about homosexuals. According to Assistant Principal Lynell Antrim, some students were asked to remove the shirts and did so, while others "had an altercation and were suspended for their actions."

Because of these conflicts in 2003, when the Gay-Straight Alliance sought to hold another "Day of Silence" in 2004, the School required the organization to consult with the Principal to "problem solve" and find ways to reduce tensions and potential altercations. On April 21, 2004, the date of the 2004 "Day of Silence," appellant Tyler Chase Harper wore a T-shirt to school on which "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED," was handwritten on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" was handwritten on the back. There is no evidence in the record that any school staff saw Harper's T-shirt on that day.

The next day, April 22, 2004, Harper wore the same T-shirt to school, except that the front of the shirt read "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED," while the back retained the same message as before, "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27.'"[4] LeMaster, Harper's second period teacher, noticed Harper's shirt and observed "several

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[4]A copy of a photograph of the T-shirt is attached as Exhibit A.

students off-task talking about" the shirt. LeMaster, recalling the altercations that erupted as a result of "anti-homosexual speech" during the previous year's "Day of Silence," explained to Harper that he believed that the shirt was "inflammatory," that it violated the School's dress code, and that it "created a negative and hostile working environment for others." When Harper refused to remove his shirt and asked to speak to an administrator, LeMaster gave him a dress code violation card to take to the front office.

When Harper arrived at the front office, he met Assistant Principal Antrim. She told Harper that the "Day of Silence" was "not about the school promoting homosexuality but rather it was a student activity trying to raise other students' awareness regarding tolerance in their judgement [sic] of others." Antrim believed that Harper's shirt "was inflammatory under the circumstances and could cause disruption in the educational setting." Like LeMaster, she also recalled the altercations that had arisen as a result of anti-homosexual speech one year prior. According to her affidavit, she "discussed [with Harper] ways that he and students of his faith could bring a positive light onto this issue without the condemnation that he displayed on his shirt." Harper was informed that if he removed the shirt he could return to class.

When Harper again refused to remove his shirt, the Principal, Scott Fisher, spoke with him, explaining his concern that the shirt was "inflammatory" and that it was the School's "intent to avoid physical conflict on campus." Fisher also explained to Harper that it was not healthy for students to be addressed in such a derogatory manner. According to Fisher, Harper informed him that he had already been "confronted by a group of students on campus" and was "involved in a tense verbal conversation" earlier that morning.[5] The Principal eventually decided that Harper could not wear his shirt on campus, a decision that, he asserts, was influenced by "the fact that during the previous year, there was tension on campus surrounding the Day of Silence between certain gay and straight students."[6] Fisher proposed some alternatives to wearing the shirt, all of which Harper turned down. Harper asked two times to be suspended. Fisher "told him that [he] did not want

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[5]In his affidavit, Harper characterized these conversations with other students as "peaceful discussions wherein differing viewpoints were communicated."

[6]We note that conflicts over homosexuality at Poway High School have not been limited to the incidents surrounding a "Day of Silence." Two former students recently won a suit against the School for failing to protect them from students who harassed them because they are gay. *See* Dana Littlefield, *Two Gay Students Were Harassed, Jury Finds*, San Diego Union-Trib., June 9, 2005, at B2. During the trial, one of the students testified that Poway "students repeatedly called him names, shoved him in the hallways, threw food at him and spit on him," and "that he heard other students make disparaging remarks about gays and lesbians on a nearly daily basis." *Id.*

him suspended from school, nor did [he] want him to have something in his disciplinary record because of a stance he felt strongly about." Instead, Fisher told Harper that he would be required to remain in the front office for the remainder of the school day.

Harper spent the rest of the day in the school conference room doing his homework. At some point during that day, Deputy Sheriff Norman Hubbert, who served as the school resource officer for Poway High, came in to speak with Harper.[7] The complaint alleges that Hubbert "came to interrogate" Harper to "determine if he was a dangerous student." Hubbert, however, asserts in his affidavit that he and Harper had a "casual conversation concerning the content of the shirt . . . the Bible and [the] scripture reference on the shirt," and that the conversation was conducted "simpl[y out of] curiosity . . . to understand the situation."

Toward the end of the school day, Assistant Principal Ed Giles spoke with Harper. Giles had discovered earlier in the day that Harper attended the same

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[7]Hubbert, who is a detective with the San Diego County Sheriff, was on campus that day because someone, purporting to be a parent, had called the School that morning complaining about the School's "condoning" the "Day of Silence" and stated that "he and several other parents had 'had it' and 'would be doing something about it.'" Concerned about safety, Principal Fisher had requested Hubbert's presence on campus on that day.

church that he had previously attended, and that he "knew [Harper's] father personally and had attended Biblical studies that [Harper's] father led on Tuesday nights." According to Giles, he went to speak with Harper "out of respect to [Harper] and his family" and "to make sure he was alright." Giles told Harper that he understood "where he was coming from" but wished that he could "express himself in a more positive way." Giles also said that he shared the same Christian faith as Harper, but that as a school employee, he had to watch how he expressed his beliefs and that when he came to work, he had to "leave his faith in [the] car." Giles then asked Harper to "consider other alternatives that would be more positive and non-confrontational," including sponsoring activities through the campus Bible Club.

After his conversation with Giles, Harper remained in the office for the last period of the day, after which he was instructed to proceed directly off campus. Harper was not suspended, no disciplinary record was placed in his file, and he received full attendance credit for the day.

II. Procedural History

On June 2, 2004, Harper filed a lawsuit in district court against Poway Unified School District and certain named individuals in their individual and official capacities. Harper alleged five federal causes of action – violations of his

right to free speech, his right to free exercise of religion, the Establishment Clause, the Equal Protection Clause, and the Due Process Clause – and one state law claim based on California Civil Code § 52.1, which creates a private cause of action for the violation of individual federal and state constitutional rights. On June 22, 2004, the School filed a motion to dismiss, and on July 12, 2004, Harper filed a motion for a preliminary injunction seeking to enjoin the school from "continuing [its] violation of the constitutional rights of Plaintiff Tyler Chase Harper." On November 4, 2004, the district court granted the School's motion to dismiss as to Harper's equal protection, due process,[8] and state law claims, but denied the motion as to his three First Amendment claims: freedom of speech, free exercise of religion, and establishment of religion. The district court also granted the School's motion to dismiss Harper's damages claims against Poway Unified School District and the individual defendants on the ground of qualified immunity. Finally, the district court denied Harper's motion for a preliminary injunction. Harper then filed an interlocutory appeal from the order denying the latter motion.[9]

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[8]The district court dismissed with prejudice only Harper's due process challenge.

[9]We note that on November 17, 2004, thirteen days after the district court rendered its decision and two days prior to filing his Notice of Appeal with this court, Harper filed a First Amended Verified Complaint adding his sister, Kelsie, (continued...)

III. Jurisdiction

We have jurisdiction to review the district court's denial of the preliminary injunction motion under 28 U.S.C. § 1292(a)(1).

IV. Standard and Scope of Review

For a district court to grant a preliminary injunction, the moving party must demonstrate either "(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). "Each of these two formulations requires an examination of both the potential merits of the asserted claims and the harm or hardships faced by the parties." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002). "These two alternatives represent extremes of a single continuum, rather than two separate tests." *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999) (citation and internal quotation marks omitted). Accordingly, "the greater the relative hardship to the

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[9](...continued)
who is a freshman at Poway High School, as a plaintiff. On February 23, 2005, the district court granted in part and denied in part the School's motion to dismiss the First Amended Complaint. Because the amended complaint is not before this court on appeal, we limit our review to Harper.

moving party, the less probability of success must be shown." *Id.* (citation and internal quotation marks omitted).

The district court concluded, and the School concedes on appeal, that because Harper's First Amendment claims survived the motion to dismiss, Harper made the necessary showing of irreparable harm. *See Sammartano*, 303 F.3d at 973 (internal quotation marks omitted) ("[A] party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim."). The balance of hardships does not, however, tip in his favor.[10] Therefore, the question is whether Harper demonstrated a likelihood of success on the merits as to any or all of his three First Amendment claims.

We review a district court's grant or denial of a preliminary injunction for abuse of discretion. *A & M Records, Inc.*, 239 F.3d at 1013. We will reverse "only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *El Pollo Loco, Inc. v.*

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[10]The district court concluded that "balancing the needs of the School to keep all their students safe coupled with the foreseeable vision that other students may feel free to exhibit these types of expressions that would interfere with the work of the school and violate the rights of others against [Harper's] interests does not tip the scales sharply in [Harper's] favor." As our analysis of *Tinker* below illustrates, not only does the balance of hardships not tip sharply in Harper's favor, but it does not tip in his favor at all.

Hashim, 316 F.3d 1032, 1038 (9th Cir. 2003) (citation and internal quotation marks omitted). Where, as here, the appellant does not dispute the district court's factual findings, we are required to determine "whether the court employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly apprehended the law with respect to the underlying issues in the case." *A & M Records, Inc.*, 239 F.3d at 1013 (internal quotation and citation omitted). The district court's interpretation of the underlying legal principles is subject to de novo review. *Id.* We may affirm the district court's order "on any ground supported by the record even if it differs from the rationale of the district court." *Nat'l Wildlife Fed'n v. United States Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004).

V. Analysis

1. Freedom of Speech Claim

The district court concluded that Harper failed to demonstrate a likelihood of success on the merits of his claim that the School violated his First Amendment right to free speech because, under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, the evidence in the record was sufficient to permit the school officials to "reasonably . . . forecast substantial disruption of or material interference with school activities." 393 U.S. 503, 514 (1969). Harper contends that the district

court erred in rejecting his free speech claim on three grounds: (1) his speech is protected under the Supreme Court's holdings in *Tinker* and *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); (2) the School's actions and policies amount to viewpoint discrimination under *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); and (3) the School's dress code and speech policies are overbroad under *Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).[11] We affirm the district court's denial of the requested

[11]We need not rule upon the validity of the School's dress code or other anti-harassment policies in order to determine whether the district court abused its discretion in denying the preliminary injunction. Harper's motion for a preliminary injunction sought only to enjoin school officials "from continuing their violation of the constitutional rights of Plaintiff Tyler Chase Harper." The only violation alleged was that Harper was precluded from wearing his T-shirt with its demeaning message while at school. The motion did not seek to enjoin the enforcement of the School's dress code or any other school policies against any and all students, but sought only to stop the violation of Harper's purported constitutional right to wear his T-shirt. Our affirmance of the district court order does not depend upon the existence of a valid school policy or code. Under *Tinker*, the School is permitted to prohibit Harper's conduct, with or without a valid anti-harassment or other policy, if it can demonstrate that the restriction was necessary to prevent either the violation of the rights of other students or substantial disruption of school activities. The record is clear that even though Harper's teacher and Vice Principal Antrim stated that the T-shirt violated the dress code, the school officials made plain to Harper that the reason he could not wear the T-shirt was because of its effect upon other students and its disruptive effect upon the educational environment, rather than because it was prohibited by a dress code. The district judge apparently concluded that the validity of the School's anti-harassment policies was not before him, or that it was not necessary to decide that question, and we cannot say that his determination was unreasonable. Finally, we

(continued...)

preliminary injunction. Although we, like the district court, rely on *Tinker*, we rely on a different provision – that schools may prohibit speech that "intrudes upon . . . the rights of other students." *Tinker*, 393 U.S. at 508.

a. Student Speech Under *Tinker*

Public schools are places where impressionable young persons spend much of their time while growing up. They do so in order to receive what society hopes will be a fair and full education – an education without which they will almost certainly fail in later life, likely sooner rather than later. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."). The public school, with its free education, is the key to our democracy. *See id.* (stating that public education "is the very foundation of good citizenship"). Almost all

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[11](...continued)
would prefer not to make even a preliminary judgment as to the constitutionality of the School's dress code or anti-harassment policies without the district court first having considered the question. Of course, following remand, the district court may do so at the appropriate time or upon the appropriate motion. In contrast, our dissenting colleague would have us engage on appeal in a sweeping examination *ab initio* of the validity of a complicated series of policies – an examination that would cause us to discuss prematurely a number of controversial constitutional issues. *See* dis. op. at 22-36. We see no need for such an exercise of our jurisdiction on this appeal.

young Americans attend public schools.[12] During the time they do – from first grade through twelfth – students are discovering what and who they are. Often, they are insecure. Generally, they are vulnerable to cruel, inhuman, and prejudiced treatment by others.

The courts have construed the First Amendment as applied to public schools in a manner that attempts to strike a balance between the free speech rights of students and the special need to maintain a safe, secure and effective learning environment. *See, e.g., Tinker*, 393 U.S. at 507 (balancing the need for "scrupulous protection of Constitutional freedoms of the individual" against the need of schools to perform their proper educational function). This court has expressly recognized the need for such balance: "States have a compelling interest in their educational system, and a balance must be met between the First Amendment rights of students and preservation of the educational process." *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001). Although public

[12]As of the fall of 2005, approximately eighty-eight percent of elementary and secondary students in the United States attended public schools. *See* DIGEST OF EDUCATION STATISTICS, 2004, NAT'L CTR. FOR EDUC. STATISTICS (2004), *available at* http://nces.ed.gov/programs/digest/d04/. Most of the rest attended religious schools. *See* STEPHEN P. BROUGHMAN & KATHLEEN W. PUGH, CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2001–2002 PRIVATE SCHOOL UNIVERSE SURVEY (U.S. Department of Education, National Center for Education Statistics) (2005).

school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, the Supreme Court has declared that "the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment."[13] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (internal citation and quotation marks omitted). Thus, while Harper's shirt embodies the very sort of political speech that would be afforded First Amendment protection outside of the public school setting, his rights in the case before us must be determined "in light of [those] special characteristics." *Tinker*, 393 U.S. at 506.

This court has identified "three distinct areas of student speech," each of which is governed by different Supreme Court precedent: (1) vulgar, lewd, obscene, and plainly offensive speech which is governed by *Fraser*,[14] (2) school-

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[13]Although Harper correctly points out that California law provides greater protection for student speech than federal law, *see* Cal. Educ. Code § 48950(a), he did not raise a state law claim in his preliminary injunction motion before the district court. Nor did he question, as he does in his brief to us, the constitutionality of the correlative provisions of the California Education Code that provide greater protection than federal law against harassment of students on the basis of sexual orientation. *See* Cal. Educ. Code §§ 200, 201, 220. Accordingly, we do not rely on or resolve any state law questions here.

[14]Because we decide Harper's free speech claim on the basis of *Tinker*, we (continued...)

sponsored speech which is governed by *Hazelwood*,[15] and (3) all other speech which is governed by *Tinker*. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (internal citations omitted).

In *Tinker*, the Supreme Court confirmed a student's right to free speech in public schools.[16] In balancing that right against the state interest in maintaining an ordered and effective public education system, however, the Court declared that a student's speech rights could be curtailed under two circumstances. First, a school may regulate student speech that would "impinge upon the rights of other students." *Tinker*, 393 U.S. at 509. Second, a school may prohibit student speech that would result in "substantial disruption of or material interference with school activities." *Id.* at 514. Because, as we explain below, the School's prohibition of the wearing of the demeaning T-shirt is constitutionally permissible under the first of the *Tinker* prongs, we conclude that the district court did not abuse its discretion

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[14](...continued)
need not consider whether his speech was "plainly offensive" under *Fraser*.

[15]Neither party here claims that Harper's speech is "school-sponsored" and thus governed by *Hazelwood*.

[16]In *Tinker*, the Supreme Court held that a public school could not ban students from wearing black armbands protesting the Vietnam war where the "silent, passive expression of opinion [was] unaccompanied by any disorder or disturbance," and there was no evidence that the display "colli[ded] with the rights of other students to be secure and to be let alone." 393 U.S. at 508.

in finding that Harper failed to demonstrate a likelihood of success on the merits of his free speech claim.[17]

i. **The Rights of Other Students**

In *Tinker*, the Supreme Court held that public schools may restrict student speech which "intrudes upon . . . the rights of other students" or "colli[des] with the rights of other students to be secure and to be let alone." 393 U.S. at 508. Harper argues that *Tinker*'s reference to the "rights of other students" should be construed narrowly to involve only circumstances in which a student's right to be free from direct physical confrontation is infringed. Drawing on the Fifth Circuit's opinion in *Blackwell v. Issaquena County Bd. of Ed.*, 363 F.2d 749, 751 (5th Cir. 1966), which the Supreme Court cited in *Tinker*, Harper contends that because the

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[17]The first part of our colleague's dissent is devoted to a discussion of whether there was sufficient evidence that the wearing of Harper's T-shirt caused substantial disruption, the *Tinker* prong on which the district court relied but which is not relevant to our holding. *See* dis. op. at 3-9. The last part of the dissent also deals with a subject we need not and do not address: what the dissent terms the School's "harassment policy." *Id.* at 22-36; *see also supra* n. 11. Oddly, the dissent spends only a relatively minor part of its discussion on the determinative issue here, the impermissible intrusion on the rights of gay and lesbian students. *Id.* at 13-22. Even more oddly, in its Conclusion the dissent suggests that speech that is fundamentally offensive to minority students may be constitutionally limited and quarrels only with whether such a limitation is consistent with the wording of *Tinker*. *Id.* at 36-37. It also suggests that the Supreme Court might properly modify *Tinker* and validate our holding. *Id.* at 37. We disagree that any modification of *Tinker* is required or desirable. All that is necessary is a fair reading of its plain language, as we explain in the following section.

speakers in *Blackwell* "accosted other students by pinning the buttons on them even though they did not ask for one," a student must be physically accosted in order to have his rights infringed.

Notwithstanding the facts of *Blackwell,* the law does not support Harper's argument. This court has explained that vulgar, lewd, obscene, indecent, and plainly offensive speech "by definition, may well 'impinge[] upon the rights of other students,'" even if the speaker does not directly accost individual students with his remarks. *Chandler*, 978 F.2d at 529 (quoting *Tinker*, 393 U.S. at 509). So too may other speech capable of causing psychological injury. The Tenth Circuit has held that the "display of the Confederate flag might . . . interfere with the rights of other students to be secure and let alone," even though there was no indication that any student was physically accosted with the flag, aside from its general display. *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1366 (10th Cir. 2000). While "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear," *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3rd Cir. 2001), we unequivocally reject Harper's overly narrow reading of the phrase.

We conclude that Harper's wearing of his T-shirt "colli[des] with the rights of other students" in the most fundamental way. *Tinker*, 393 U.S. at 508. Public school students who may be injured by verbal assaults on the basis of a core

identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to "be secure and to be let alone." *Id.* Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.[18] The "right to be let alone" has been recognized by the Supreme Court, of course, as "'the most comprehensive of rights and the right most valued by civilized men.'" *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Indeed, the "recognizable privacy interest in avoiding unwanted communication" is perhaps most important "when persons are 'powerless to avoid' it." *Id.* at 716 (quoting *Cohen v. California*, 403 U.S. 15, 21-22 (1971)). Because minors are subject to mandatory attendance requirements, the Court has emphasized "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children – especially in a captive audience . . . ." *Fraser*, 478 U.S. at 684.

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[18]There is nothing in *Tinker* that remotely supports the dissent's contention that the rights to "be secure and to be let alone" are limited to rights such as those that protect against "assault, defamation, invasion of privacy, extortion and blackmail." Dis. op. at 14. Security and privacy entail far more than freedom from those torts. Nor does the dissent offer any reason why the rights to security and privacy do not include freedom from verbal assaults that cause psychological injury to young people.

Although name-calling is ordinarily protected outside the school context, "[s]tudents cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school." *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3rd Cir. 2002).

Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn.[19] The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development. Indeed, studies demonstrate that "academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and verbal and physical abuse at school." Susanne M. Stronski Huwiler and Gary Remafedi, *Adolescent Homosexuality*, 33 REV. JUR. U.I.P.R. 151, 164 (1999); *see also* Thomas A. Mayes,

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[19]California law provides that "[a]ll pupils have the right to participate fully in the educational process, free from discrimination and harassment." Cal. Educ. Code § 201(a). The dissent expostulates on the meaning of the term "harassment" and speculates as to whether the California statute may be contrary to the First Amendment, all of which is irrelevant here because we do not rely on the statute in reaching our decision. *See* dis. op. at 13-15.

Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers, 29 FORDHAM URB. L.J. 641, 655 (2001) (describing how gay students are at a greater risk of school failure and dropping out, most likely as a result of "social pressure and isolation"); Amy Lovell, *"Other Students Always Used to Say, 'Look At The Dykes'": Protecting Students From Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 617, 625-28 (1998) (summarizing the negative effects on gay students of peer sexual orientation harassment). One study has found that among teenage victims of anti-gay discrimination, 75% experienced a decline in academic performance, 39% had truancy problems and 28% dropped out of school. *See* Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 225 (2005). Another study confirmed that gay students had difficulty concentrating in school and feared for their safety as a result of peer harassment, and that verbal abuse led some gay students to skip school and others to drop out altogether. HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS (1999), http://hrw.org/reports/2001/uslgbt/Final-05.htm#P609_91364. Indeed, gay teens suffer a school dropout rate over three times the national average. NAT'L MENTAL HEALTH ASS'N, BULLYING IN SCHOOLS: HARASSMENT PUTS GAY YOUTH AT RISK,

http://www.nmha.org/pbedu/backtoschool/bullyingGayYouth.pdf; *see also* Maurice R. Dyson, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 187 (2004) (gay teens face greater risks of "dropping out [and] performing poorly in school"); Kelli Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 GOLDEN GATE U. L. REV. 67, 76-77 (1994) (describing how abuse by peers causes gay youth to experience social isolation and drop out of school). In short, it is well established that attacks on students on the basis of their sexual orientation are harmful not only to the students' health and welfare, but also to their educational performance and their ultimate potential for success in life.

Those who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development.[20] *See Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1540 (7th Cir. 1996) (stating that elementary schools may restrict speech "that could crush a child's sense of self-worth"); *Saxe*, 240 F.3d at 217 (observing that speech that "substantially

[20]In fact, California schools like Poway High are required by law "to minimize and eliminate a hostile environment on school grounds that impairs the access of pupils to equal educational opportunity." Cal. Educ. Code § 201(f).

interfer[es] with a student's educational performance" may satisfy the *Tinker* standard).[21] To the contrary, the School had a valid and lawful basis for restricting Harper's wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn.[22]

The dissent claims that we should not take notice of the fact that gay students are harmed by derogatory messages such as Harper's because there is no

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[21] *Saxe* considered the validity of a school district's anti-harassment policy, a question we do not address here. *See supra* n.11. Although in its discussion of a provision regarding "hostile environment," *Saxe* briefly alludes to the "interference with the rights of others" prong of *Tinker*, it appears to conflate that prong with the "substantial disruption" prong and to suggest, perhaps inadvertently, that injurious slurs may not be prohibited unless they also cause substantial disruption. *See Saxe*, 240 F.3d at 217. That clearly is not the case. The two *Tinker* prongs are stated in the alternative. *See Tinker*, 393 U.S. at 508. We agree, however, with *Saxe*'s conclusion that "it is certainly not enough that the speech is merely offensive to some listener." *Saxe*, 240 F.3d at 217.

[22] As noted *supra*, California law explicitly recognizes the right of students to be free from harassment on the basis of sexual orientation. *See* Cal. Educ. Code § 200, 201. These provisions were enacted not in a vacuum, but out of a recognition on the part of the state legislature of "an urgent need to prevent and respond to acts of hate violence and bias-related incidents that are occurring at an increasing rate in California's public schools." *Id.* at § 201(d). We also observe that federal law provides public school students some protection against harassment and discriminatory treatment based on sexual orientation. For example, in *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134-35 (9th Cir. 2003), we held that the Equal Protection Clause protects against school districts' indifference to certain kinds of negative speech aimed at gay students. *See also* Mayes, *supra*, at 643 (observing that harassment based on sexual orientation may be actionable under Title IX as harassment based on sex).

"evidence" that they are in fact injured by being shamed or humiliated by their peers. *See* dis. op. at 15-18. It is simply not a novel concept, however, that such attacks on young minority students can be harmful to their self-esteem and to their ability to learn. As long ago as in *Brown v. Board of Education*, the Supreme Court recognized that "[a] sense of inferiority affects the motivation of a child to learn." 347 U.S. at 494 (internal quotation marks omitted). If a school permitted its students to wear shirts reading, "Negroes: Go Back To Africa," no one would doubt that the message would be harmful to young black students. So, too, in the case of gay students, with regard to messages such as those written on Harper's T-shirt.[23] As our dissenting colleague recently concluded, "[y]ou don't need an expert witness to figure out" the self-evident effect of certain policies or messages. *Jespersen v. Harrah's Operating Co., Inc.*, No. 03-15045, 2006 WL 962533, at *13 (9th Cir. April 14, 2006) (Kozinski, Circuit Judge, dissenting). Just as Judge

[23]There is much literature to this effect. *See supra* pp. 21-23. Our dissenting colleague's notion of "evidence" appears to be rather odd. It seems to consist largely of motion pictures and television shows. The dissent draws conclusions that it is "not unusual in a high school classroom for students to be 'off-task'" and that politics and other subjects "are the ordinary subjects of discourse in high school corridors" on the basis of our colleague's viewing of a number of popular entertainment features. *See* dis. op. at 4 n.2 & 5 n.3. Perhaps he would prefer us to cite *Brokeback Mountain* (Paramount Pictures 2005) or *The Matthew Shepard Story* (2002), as evidence of the harmful effects of anti-gay harassment rather than simply stating that which, to anyone familiar with or in any way sensitive to, the history or effect of discrimination, is a self-evident fact.

Kozinski found it to be "perfectly clear" – *without the aid of any evidence in the record* – that an employer's makeup requirement burdened women, the fact that Harper's demeaning statement is harmful to gay students at Poway High "hardly seem[s] like [a] question[] reasonably subject to dispute." *Id.* at *12. One would think that if we should be able to take notice of how long it takes women to put on makeup, or that makeup is an expensive item, we can certainly take notice that it is harmful to gay teenagers to be publicly degraded and called immoral and shameful.[24] Certainly, the California legislature had no difficulty in determining that harassment on the basis of sexual orientation adversely affects the rights of public high school students. *See* Cal. Educ. Code § 201(c).[25]

The dissent takes comfort in the fact that there is a political disagreement regarding homosexuality in this country. *See* dis. op. at 12. We do not deny that

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[24]We should point out that we are considering here whether to reverse a denial of a preliminary injunction. The extent to which a self-evident proposition must be established in order to avoid such a reversal under an abuse of discretion standard is not necessarily the same as may be required at a trial on the merits, although we express no view on the latter question.

[25]Although we do not rely on the California statute to support our holding, we note that the Legislature, in the California Schools Hate Violence Reduction Act of 1995, declared: "Harassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and *jeopardizes equal educational opportunity* as guaranteed by the California Constitution and the United States Constitution." Cal. Educ. Code. § 201(c) (emphasis added).

there is, just as there was a longstanding political disagreement about racial equality that reached its peak in the 1950's and about whether religious minorities should hold high office that lasted at least until after the 1960 presidential election,[26] or whether blacks or Jews should be permitted to attend private universities and prep schools, work in various industries such as banks, brokerage houses, and Wall Street law firms, or stay at prominent resorts or hotels. Such disagreements may justify social or political debate, but they do not justify students in high schools or elementary schools assaulting their fellow students with demeaning statements: by calling gay students shameful, by labeling black students inferior or by wearing T-shirts saying that Jews are doomed to Hell. Perhaps our dissenting colleague believes that one can condemn homosexuality without condemning homosexuals. If so, he is wrong. To say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful. There are numerous locations and opportunities available to those who wish to advance such

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[26]For example, in the late 19th century, James G. Blaine ran for President in a campaign that is remembered for its slogan of "Rum, Romanism and Rebellion." *See* Richard G. Bacon, *Rum, Romanism and Romer*, 6 DEL. L. REV. 1, 39-40 (2003); *see also* Joseph P. Viteritti, *Davey's Plea: Blaine, Blair, Witters, and the Protection of Religious Freedom*, 27 HARV. J. L. & PUB. POL'Y 299, 311 (2003) (citation omitted) (observing that Blaine's campaign for the Republican nomination "was built around his (and the party's) opposition to 'Rum, Romanism, and Rebellion.'").

an argument. It is not necessary to do so by directly condemning, to their faces, young students trying to obtain a fair and full education in our public schools.

Our dissenting colleague also appears to believe that the fact that Harper wore his T-shirt in response to a "Day of Silence" somehow lessens the injurious effect of his act because by participating in the gay rights event, gay students "perforce acknowledge that their status is not universally admired or respected." Dis. op. at 19. This argument is completely without merit. The fact that gays, or for that matter blacks, Jews, or Latinos, recognize that they are the subject of prejudice and are not "respected" or considered equal by some in certain public schools in this country does not mean that they are not injured when the usually unspoken prejudice turns into harmful verbal conduct. Moreover, the dissent's assertion that gay students may prefer to see the demeaning statements contained on Harper's T-shirt rather than on bathroom walls makes even less sense. *See id.* The First Amendment does not justify students launching such injurious and harmful personal attacks in either location.

What we hold in this opinion is a far cry from what the dissent suggests. We do not hold that schools may "define civic responsibility and then ban opposing points of view." *Id.* at 10 n.7. The question of what types of assemblies schools should or may conduct regarding controversial public issues or what types of

speech students may otherwise generally engage in regarding such issues is not before us. Different circumstances require different results. We consider here only whether schools may prohibit the wearing of T-shirts on high school campuses and in high school classes that flaunt demeaning slogans, phrases or aphorisms relating to a core characteristic of particularly vulnerable students and that may cause them significant injury. We do not believe that the schools are forbidden to regulate such conduct. Nor, contrary to the dissent, do we believe that because a school sponsors or permits a "Day of Tolerance" or a "Day of Silence" minority students should be required to publicly "[c]onfront[]" and "refut[e]" demeaning verbal assaults on them – that they may be left with no option other than to try to justify their sexual practices to the entire student body or explain to all their fellow students why they are not inferior or evil. *Id.* at 19. The First Amendment does not require that young students be subjected to such a destructive and humiliating experience.

In his declaration in the district court, the school principal justified his actions on the basis that "any shirt which is worn on campus which speaks in a derogatory manner towards an individual or group of individuals is not healthy for young people . . . ." If, by this, the principal meant that all such shirts may be banned under *Tinker*, we do not agree. T-shirts proclaiming, "Young Republicans

Suck," or "Young Democrats Suck," for example, may not be very civil but they would certainly not be sufficiently damaging to the individual or the educational process to warrant a limitation on the wearer's First Amendment rights. Similarly, T-shirts that denigrate the President, his administration, or his policies, or otherwise invite political disagreement or debate, including debates over the war in Iraq, would not fall within the "rights of others" *Tinker* prong.[27]

Although we hold that the School's restriction of Harper's right to carry messages on his T-shirt was permissible under *Tinker*, we reaffirm the importance of preserving student speech about controversial issues generally and protecting the bedrock principle that students "may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511; *see also Fraser*, 478 U.S. at 681 (noting students' "freedom to advocate unpopular and controversial views in schools and classrooms"). It is essential that students have the opportunity to engage in full and open political expression, both in and out of the school environment. Engaging in controversial political speech, even when it

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[27]The dissent suggests that our decision might somehow allow a school to restrict student T-shirts that voice strongly-worded opposition to the war in Iraq. *See* dis. op. at 12. That is not so. Our colleague ignores the fact that our holding is limited to injurious speech that strikes at a core identifying characteristic of students on the basis of their membership in a minority group. The anti-war T-shirts posited by the dissent constitute neither an attack on the basis of a student's core identifying characteristic nor on the basis of his minority status.

is offensive to others, is an important right of all Americans and learning the value of such freedoms is an essential part of a public school education. Indeed, the inculcation of "the fundamental values necessary to the maintenance of a democratic political system" is "truly the 'work of the schools.'" *Fraser*, 478 U.S. at 683 (quoting *Tinker*, 393 U.S. at 508). Limitations on student speech must be narrow, and applied with sensitivity and for reasons that are consistent with the fundamental First Amendment mandate. Accordingly, we limit our holding to instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation.[28] Moreover, our decision is based

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[28]We do not consider here whether remarks based on gender warrant similar treatment, preferring to leave that question to another time. We recognize, however, that problems of gender discrimination remain serious and that they exist throughout learning institutions, from the public and religious schools to institutions of higher learning, not excluding the most prominent institutions in the nation.

Our dissenting colleague worries that offensive words directed at majority groups such as Christians or whites will not be covered by our holding. *See* dis. op. at 21. There is, of course, a difference between a historically oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic and political status. Growing up as a member of a minority group often carries with it psychological and emotional burdens not incurred by members of the majority. In any event, any verbal assault targeting majorities that might justify some form of action by school officials is more likely to fall under the "substantial disruption" prong of *Tinker* or under the *Fraser* rule permitting schools to prohibit "plainly offensive" speech. 478 U.S. at 683; *cf. Frederick v. Morse*, 439 F.3d 1114, 1122 n.44 (9th Cir. 2006) (observing that *Fraser* "only enables schools to prevent the sort of vulgar, obscene,

(continued...)

not only on the type and degree of injury the speech involved causes to impressionable young people, but on the locale in which it takes place. *See Tinker*, 393 U.S. at 506 (student rights must be construed "in light of the special characteristics of the school environment"). Thus, it is limited to conduct that occurs in public high schools (and in elementary schools). As young students acquire more strength and maturity, and specifically as they reach college age, they become adequately equipped emotionally and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years. Accordingly, we do not condone the use in public colleges or other public institutions of higher learning of restrictions similar to those permitted here.

Finally, we emphasize that the School's actions here were no more than necessary to prevent the intrusion on the rights of other students. Aside from prohibiting the wearing of the shirt, the School did not take the additional step of punishing the speaker: Harper was not suspended from school nor was the incident made a part of his disciplinary record.

Under the circumstances present here, we conclude that the School's actions did not extend beyond the scope of the restrictions permitted by *Tinker*, and that

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[28](...continued)
lewd or sexual speech that, specially with adolescents, readily promotes disruption")

the district court did not abuse its discretion in finding that Harper failed to demonstrate a likelihood of success on the merits of his free speech claim.

ii. **Substantial Disruption**

The district court concluded that Harper had failed to demonstrate a likelihood of success on the merits of his free speech claim because there was sufficient evidence to permit the school officials to "reasonably . . . forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. In so holding, the district court relied on the declarations of Principal Fisher, Assistant Principal Antrim, and LeMaster which described how the previous year's "Day of Silence" had resulted in "volatile behavior" and "tensions between students," including physical altercations. The court also cited LeMaster's testimony that he had observed disruption in the class that Harper attended while wearing the T-shirt, and Principal Fisher's testimony that Harper told him that a "tense verbal conversation with a group of students" had already taken place due to the T-shirt's message.

In light of our conclusion regarding the application of the "rights of others" prong of *Tinker*, we have no cause to decide whether the evidence would be

sufficient to warrant denial of a preliminary injunction under the "substantial disruption" prong as well.[29]

b. Viewpoint Discrimination

In reaching our decision that Harper may lawfully be prohibited from wearing his T-shirt, we reject his argument that the School's action constituted impermissible viewpoint discrimination. The government is generally prohibited

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[29]Our recent decision in *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), is in no respect inconsistent with this opinion. In *Frederick*, we held that a public high school's suspension of a student for displaying off campus, during the running of the Winter Olympics Torch Relay, a banner that read "Bong Hits 4 Jesus," violated *Tinker*. *Frederick* differs from the present case in four fundamental ways. First and foremost, *Frederick* did not address the "intrudes upon the rights of others" prong of *Tinker*, the ground upon which we base our holding here. Rather, the only issue in *Frederick* was whether the other *Tinker* prong – "substantial disruption" – was applicable. Second, in *Frederick* we concluded that the school's actions did not meet the "substantial disruption" prong because the school officials conceded that they punished the student's display of the banner *not* out of "concern that it would cause disruption" but because "the speech promotes a social message contrary to the one favored by the school." *Id.* at 1117-18. Here, although in view of our holding, we need not (and do not) consider the "substantial disruption" prong of *Tinker*, the School presented evidence that it restricted Harper's wearing of the T-shirt because it expected that his doing so would cause substantial disruption. Third, *Frederick* involved punishing student speech that took place "outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials." *Id.* at 1123. By contrast, Harper wore the offending T-shirt not only on campus, but inside the classroom. Finally, in the case before us, the School adopted the least restrictive means of curing the injury; it simply forbade the wearing of the garment. In *Frederick*, in contrast, the school authorities punished the student harshly for the purported (but non-existent) offense by suspending him for ten days. *Id.* at 1116.

from regulating speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. However, as the district court correctly pointed out, speech in the public schools is not always governed by the same rules that apply in other circumstances. *See Hazelwood*, 484 U.S. at 266; *Fraser*, 478 U.S. at 685; *West*, 206 F.3d at 1366 (schools may ban student speech that "could well be considered a form of political speech to be afforded First Amendment protection outside the educational setting"). Indeed, the Court in *Tinker* held that a school may prohibit student speech, even if the consequence is viewpoint discrimination, if the speech violates the rights of other students or is materially disruptive. *See Tinker*, 393 U.S. at 511 (stating school cannot prohibit "expression of one particular opinion" unless it makes a specific showing of constitutionally valid reasons); *see also Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004) (stating that *Tinker* "applies to school regulations directed at specific student viewpoints"); *Muller by Muller*, 98 F.3d at 1538 (emphasis added) (observing difference between suppressing religious speech "solely because it is religious" and suppressing speech that is "religious *and* disruptive or hurtful"). Thus, pursuant to *Tinker*, courts have allowed schools to ban the display of Confederate flags despite the fact that such a ban may constitute viewpoint discrimination. *See Scott*, 324 F.3d at

1248 (upholding ban on Confederate flag where school officials presented evidence of racial tensions at the school); *West*, 206 F.3d at 1366 (same). While the Confederate flag may express a particular viewpoint, "[i]t is not only constitutionally allowable for school officials" to limit the expression of racially explosive views, "it is their duty to do so." *Scott*, 324 F.3d at 1249. Because, as we have already explained, the record demonstrates that Harper's speech intruded upon the rights of other students, the School's restriction is permissible under *Tinker*, and we must reject Harper's viewpoint discrimination claim.[30]

The dissent claims that although the School may have been justified in banning discussion of the subject of sexual orientation altogether, it cannot "gag[] only those who oppose the Day of Silence." Dis. op. at 11. As we have explained, however, although *Tinker* does not allow schools to restrict the non-invasive, non-disruptive expression of political viewpoints, it does permit school authorities to restrict "one particular opinion" if the expression would "impinge upon the rights

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[30]The cases on which Harper relies to support his viewpoint discrimination claim involve the entirely different question whether schools may deny student groups access to school resources on the basis of their religious viewpoint. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386-87 (1993) (school allowed use of school facilities for private groups, but prohibited "meetings for religious purposes"); *Prince v. Jacoby*, 303 F.3d 1074, 1090 (9th Cir. 2002) (school allowed student clubs access to school facilities but excluded student Bible club). Those cases are not relevant here.

of other students" or substantially disrupt school activities. *Tinker*, 393 U.S. at 509, 511. Accordingly, a school may permit students to discuss a particular subject without being required to allow them to launch injurious verbal assaults that intrude upon the rights of other students.

"A school need not tolerate student speech that is inconsistent with its basic educational mission, [] even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citation and internal quotation marks omitted). Part of a school's "basic educational mission" is the inculcation of "fundamental values of habits and manners of civility essential to a democratic society." *Fraser*, 478 U.S. at 681 (internal quotation marks omitted). For this reason, public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred. As we have explained, *supra* pp. 28-29, because a school sponsors a "Day of Religious Tolerance," it need not permit its students to wear T-shirts reading, "Jews Are Christ-Killers" or "All Muslims Are Evil Doers." Such expressions would be "wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. Similarly, a school that permits a "Day of Racial Tolerance," may restrict a student from displaying a swastika or a

Confederate Flag. *See West*, 206 F.3d at 1365-66. In sum, a school has the right to teach civic responsibility and tolerance as part of its basic educational mission; it need not as a quid pro quo permit hateful and injurious speech that runs counter to that mission.[31]

We again emphasize that we do not suggest that all debate as to issues relating to tolerance or equality may be prohibited. As we have stated repeatedly, we consider here only the question of T-shirts, banners, and other similar items bearing slogans that injure students with respect to their core characteristics. Other issues must await another day.

2. Free Exercise of Religion Claim

Harper also contends that the district court erred because he was entitled to a preliminary injunction as a result of the School's violation of his rights under the Free Exercise Clause. He asserts that his wearing of the T-shirt was "motivated by sincerely held religious beliefs" regarding homosexuality[32] and that the School

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[31]We note, incidentally, that the incident in question occurred on the day after the "Day of Silence," and not on the day itself.

[32]We do not, of course, consider whether Harper's views are consistent with his religion, nor do we ask whether his religion truly encourages homophobic conduct. Similarly, we do not consider whether the isolated excerpt from the New Testament, *Romans 1:27*, is representative of Christian doctrine generally. All such inquiries are beyond the judiciary's authority. *See Hernandez v. C.I.R.*, 490 (continued...)

"punished" him for expressing them, or otherwise burdened the exercise of those views. Additionally, Harper argues that the School "attempted to change" his religious views and that this effort violated both the Free Exercise Clause and the Establishment Clause.

The Free Exercise Clause of the First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion. U.S. Const. amend. I. The Clause prohibits the government from "compel[ling] affirmation of religious belief, punish[ing] the expression of religious doctrines it believes to be false, impos[ing] special disabilities on the basis of religious views or religious status, or lend[ing] its power to one or the other side in controversies over religious authority or dogma." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (internal quotation marks and citations omitted).

In *Sherbert v. Verner*, the Supreme Court held that governmental actions that substantially burden a religious belief or practice must be justified by a compelling state interest and must be narrowly tailored to serve that interest. 374 U.S. 398, 402-03 (1963). The *Sherbert* test was later largely discarded in *Smith*, which held

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[32](...continued)
U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.")

that the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. 872, 879 (1990) (citation omitted). The Court held that a neutral law of general applicability need not be supported by a compelling governmental interest even though it has the incidental effect of burdening religion. *See id.* at 885; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).[33] The Court noted, however, that a "hybrid claim," *i.e.*, a claim that involves "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech," merits application of strict scrutiny: the law or action must be narrowly tailored to advance a compelling government interest. *Smith*, 494 U.S. at 881; *see also Miller v. Reed,* 176 F.3d 1202, 1207 (9th Cir. 1999) (same). Although it did not say so expressly, in *Smith* the Court preserved the *Sherbert* test for use in hybrid-rights cases. In order, however, "to assert a hybrid-rights claim, a free exercise plaintiff must make out a colorable claim that a companion right has been violated – that is,

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[33]"A law is one of neutrality and general applicability if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief[.]'" *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) (quoting *Lukumi*, 508 U.S. at 546).

a fair probability or a likelihood, but not a certitude, of success on the merits." *Miller*, 176 F.3d at 1207 (internal citation and quotation marks omitted).

Harper does not contend that the School's prohibition against his wearing his T-shirt was motivated by other than secular reasons or that it was applied to him because of his religious views. Nor is there anything in the record to suggest that other students wearing T-shirts similarly demeaning of gay and lesbian members of the student body would be treated differently, Christians or not.[34] Under *Smith*, Harper's claim would surely fail. Harper asserts, however, that we should apply *Sherbert*'s strict scrutiny test to his free exercise claim because his is a "hybrid" claim involving the Free Exercise Clause in conjunction with other constitutional claims.[35] The School disagrees, arguing that the district court properly applied rational basis review under *Smith* because its prohibition of

[34]Harper does not argue that the School's ban on his wearing the injurious and demeaning T-shirt was arbitrary or capricious, only that it violated the First Amendment rights discussed herein.

[35]Although Harper refers to "other constitutional claims" and even "numerous constitutional claims," the only claim that has the potential to justify his invoking of "hybrid" status is the free speech claim.

Harper's speech involved a "valid and neutral [rule] of general applicability."[36] *Smith*, 494 U.S. at 879.

We seriously doubt that there is "a fair probability or a likelihood" that Harper's claim that a companion right – free speech – has been violated will succeed on the merits, as required by *Miller*. 176 F.3d at 1207 (internal quotation marks omitted).[37] In fact, we are fairly confident that it will not, for the reasons we have explained *supra* Part V.1. Nevertheless, we need not decide whether Harper's free exercise claim is properly deemed a "hybrid" claim, because, whether or not *Sherbert*'s strict scrutiny test applies, Harper cannot prevail here. "Under the *Sherbert* test, governmental actions that substantially burden a religious practice

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[36]The district court determined that, "without the free speech claim, plaintiff's free exercise claim does not require strict scrutiny." It then ignored the free speech claim, apparently because it had already found that it was unlikely to succeed. Applying rational basis review, the court concluded that the School's action was rationally based on a legitimate pedagogical concern, and that Harper failed to demonstrate that it was irrational or wholly arbitrary.

[37]We note that the School conceded in essence that the free speech claim was "colorable" for purposes of Harper's establishing "irreparable harm" – one of the factors that may in combination with others justify issuance of a preliminary injunction. *See supra* pp. 10-12. We need not consider, however, whether "colorable" has different meanings for purposes of irreparable harm under *Sammartano*, and for purposes of a hybrid claim under *Miller*, as we assume here that Harper's free speech claim *is* colorable for the latter purpose as well.

must be justified by a compelling governmental interest."[38] *Smith*, 494 U.S. at 883. In this case, Harper flunks the test in every respect.

Assuming that *Sherbert* applies, we must first consider whether the School's actions "substantially burden" a religious practice or belief. The record simply does not demonstrate that the School's restriction regarding Harper's T-shirt imposed a substantial burden upon the free exercise of Harper's religious beliefs. There is no evidence that the School "compell[ed] affirmation of a repugnant belief," "penalize[d] or discriminate[d] against [Harper] because [he] hold[s] religious views abhorrent to the authorities," or "condition[ed] the availability of benefits upon [Harper's] willingness to violate a cardinal principle of [his] religious faith." *Sherbert*, 374 U.S. at 402, 406. Nor did the School "lend its power to one or the other side in controversies over religious authority or dogma," or "punish the expression of religious doctrines it believes to be false." *Smith*, 494 U.S. at 877.

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[38]We have described the *Sherbert* test as requiring the weighing of three factors: (1) how much the state action interferes with the exercise of religious beliefs; (2) whether there is a compelling state interest justifying a burden on religious beliefs; and (3) whether accommodating those beliefs would unduly interfere with the fulfillment of the government interest. *N.L.R.B. v. Hanna Boys Center*, 940 F.2d 1295, 1305 (9th Cir. 1991).

Despite Harper's allegation that the School "punished" him for expressing his religious views, the record demonstrates the contrary: the School did not punish Harper at all. It simply prohibited him from wearing the offensive and disruptive shirt and required him to refrain from attending class for a portion of a day, if he insisted on continuing to wear it. Nor did the restriction imposed on Harper's wearing of the T-shirt constitute a substantial limitation on his right to express his religious views. No one has the right to proclaim his views at all times in all manners in all places, regardless of the circumstances, and Harper does not contend that his religion suggests otherwise. Harper remains free to express his views, whatever their merits, on other occasions and in other places. The prohibition against the wearing of a T-shirt in school does not constitute a substantial burden on the exercise of his religious beliefs.

Even if a religious creed, or an individual's interpretation of that creed, could be said to require its adherents to proclaim their religious views at all times and in all places, and to do so in a manner that interferes with the rights of others, the First Amendment would not prohibit the state from banning such disruptive conduct in certain circumstances, including on a high school campus. The Constitution does not authorize one group of persons to force its religious views on others or to compel others to abide by its precepts. Nor does it authorize

individuals to engage in conduct, including speech, on the grounds of public schools, that is harmful to other students seeking to obtain a fair and equal education – even if those individuals hold a sincere belief that the principles of their religion require them to discriminate against others, or to publicly proclaim their discriminatory views whenever they believe that "evil" practices are being condoned. *See Sherbert*, 374 U.S. at 403 (internal quotation marks omitted) ("[E]ven when the action is in accord with one's religious convictions, it is not totally free from legislative restrictions."). Schools may prohibit students and others from disrupting the educational process or causing physical or psychological injury to young people entrusted to their care, whatever the motivations or beliefs of those engaged in such conduct. Indeed, the state's interest in doing so is compelling.

Because there is no evidence that the School's restriction on Harper's wearing of his T-shirt substantially burdened a religious practice or belief, and because the School has a compelling interest in providing a proper educational environment for its students and because its actions were narrowly tailored to achieve that end,[39] it would appear that the district court did not abuse its discretion

[39]As discussed earlier, the School did no more than necessary to further its compelling interest in protecting the rights of students and maintaining a healthy (continued...)

in finding that Harper failed to demonstrate a likelihood of success on the merits as to his free exercise of religion claim. Before reaching that conclusion, however, we must deal with one final argument that Harper raises as a part of that claim. Harper asserts that the School "attempted to change" his religious views that "homosexuality is harmful to both those who practice it and the community at large." Specifically, Harper alleges that the school officials' comments that his shirt was "inflammatory," Detective Hubbert's questioning of him, and Assistant Principal Giles' statement that he leaves his Christian faith in the car when he comes to school, all were attempts by school authorities to change his religious views.

The district court rejected Harper's contention. Indeed, there is no evidence in the record that the school representatives sought to change Harper's religious beliefs. Harper's complaint avers that Detective Hubbert "proposed to [Harper] that as a member of the Christian faith, he should understand that Christianity was based on love not hate, and that [he] should not be offensive to others." Hubbert's homily did not constitute an attempt to change Harper's religious views, simply his

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[39](...continued)
learning environment. It merely prohibited Harper from wearing the T-shirt at school, and did not even take the additional step of suspending or otherwise punishing him.

offensive behavior; at most, it was, as the district court concluded, an "option[] presented to and left with" Harper. The statements that the message on Harper's shirt was "inflammatory" and would be harmful to the educational environment were merely statements of fact that represented the School's informed judgment. More important, like Hubbert's statement, they were designed to affect Harper's behavior not his beliefs. As for Giles' comments, his affidavit stated that he did not tell Harper to "leave his own faith in the car," but explained that, as a school employee, he, Giles, had to leave *his own* Christian faith in the car when he came to work. While Giles' statement might also be construed as an attempt to encourage Harper to change his conduct – to refrain, while on campus, from expressing religious views that denigrate others – it cannot be characterized as an attempt to change his views. In fact, rather than tell Harper to change his beliefs, Giles encouraged him to join the campus Bible Club so that he could become part of an "activity that would express his [Christian] opinions in a positive way on campus," an activity that was wholly consistent with Harper's religious views. The record thus does not support Harper's claim that the School violated his free exercise right by "attempting to change" his religious views.

Moreover, school officials' statements and any other school activity intended to teach Harper the virtues of tolerance constitute a proper exercise of a

school's educational function, even if the message conflicts with the views of a particular religion. A public school's teaching of secular democratic values does not constitute an unconstitutional attempt to influence students' religious beliefs. Rather, it simply reflects the public school's performance of its duty to educate children regarding appropriate secular subjects in an appropriate secular manner. As we have reiterated earlier, "the inculcation of fundamental values necessary to the maintenance of a democratic political system" is "truly the 'work of the schools.'" *Fraser*, 478 U.S. at 681, 683 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979); quoting *Tinker*, 393 U.S. at 508). Public schools are not limited to teaching materials that are consistent with all aspects of the views of all religions. So long as the subject and materials are appropriate from an educational standpoint and the purpose of the instruction is secular, the school's teaching is not subject to a constitutional objection that it conflicts with a view held by members of a particular religion. There is no evidence here that the school officials' comments were associated with a religious, as opposed to a secular, purpose. Their affidavits demonstrate that the School acted in order to maintain a secure and healthy learning environment for all its students, not to advance religion.

The Constitution does not preclude school districts from teaching the essential elements of democracy or otherwise performing their proper educational

mission simply because some individuals or groups may assert that their religious views are inconsistent with the lessons taught as a part of that mission. Accordingly, we affirm the district court's decision that Harper was not entitled to a preliminary injunction on the basis of his free exercise claim.

3. Establishment Clause Claim

Finally, we consider the district court's conclusion that Harper did not demonstrate a likelihood of success on the merits of his claim that the School violated the Establishment Clause by attempting to "coerce" him into changing his religious beliefs that "homosexuality is harmful to both those who practice it and the community at large."

Harper's Establishment Clause claim as presented on appeal appears to be simply a restatement of his Free Exercise claim. In fact, as the Supreme Court has noted, its Establishment Clause cases "for the most part have addressed governmental efforts to *benefit* religion or particular religions," and thus allegations of an "attempt to *disfavor*" a religion, such as Harper's, are properly analyzed under the Free Exercise Clause. *Lukumi*, 508 U.S. at 532 (emphasis added). However, in the interest of thoroughness, we briefly address Harper's claim of "coercion" under the Establishment Clause.

Harper bases his claim almost entirely on the Supreme Court's statement in *Lee v. Weisman*, that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[40] 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). Here, there is no evidence that the School's actions were based on anything other than an entirely secular and legitimate aim of protecting the rights of students and promoting a tolerant and safe learning environment. There is certainly no evidence (or even allegation) that school authorities sought to coerce or encourage Harper to participate in some other religion or to adopt some state-supported or other religious faith. To reiterate what we explained in the "Free Exercise" section of this opinion, the teaching of secular democratic values does not violate the First Amendment, even if that teaching conflicts in some respect with a sincerely held view that a student or his parents may attribute to the particular religion to which they adhere.

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[40]The only other case upon which Harper relies for his coercion claim is *Peloza v. Capistrano Unified Sch. Dist.*, in which this court observed that "[t]o permit [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause." 37 F.3d 517, 522 (9th Cir. 1994). Like *Lee*, the case is inapposite as it involves the entirely different issue of school-sanctioned religious speech which "would have the primary effect of advancing religion, and would entangle the school with religion." *Id.*

Government conduct does not violate the Establishment Clause when (1) it has a secular purpose, (2) its principal and primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement in religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). For the reasons we have already explained, the record supports the district court's conclusion that the School's actions "had a secular purpose, *i.e.*, promoting tolerance, and not advancing or inhibiting religion." It is also clear from the record that the primary effect of the School's banning of the T-shirt was not to advance or inhibit religion but to protect and preserve the educational environment and the rights of other members of the student body. Nor can there be any question in this case of excessive government entanglement in religion. Finally, as we have already discussed, there is no evidence in the record that school officials attempted to change Harper's religious beliefs. A fortiori, there is no evidence that they attempted to *coerce* Harper into changing his beliefs. For all the above reasons, we hold that the district court did not abuse its discretion in finding that Harper failed to demonstrate a likelihood of success on the merits of his Establishment Clause claim.

4. Other Claims

In addition to the denial of his preliminary injunction motion, Harper asks that we review the district court's dismissal of his due process and equal protection causes of action, as well as the court's grant of qualified immunity to the individual defendants, under the doctrine of "pendent appellate jurisdiction." We may exercise pendent appellate jurisdiction "over rulings that are inextricably intertwined with or necessary to ensure meaningful review of decisions that are properly before us on interlocutory appeal." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 668 (9th Cir. 2004) (internal quotation marks omitted). In order for pendent issues to be "inextricably intertwined" they must either "'(a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal . . . or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.'" *Batzel v. Smith*, 333 F.3d 1018, 1023 (9th Cir. 2003) (quoting *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000)).

With regard to Harper's due process cause of action, it is based on his claim that the School's dress code is impermissibly vague in violation of the Due Process Clause. As we have already explained, *see supra* note 11, we need not consider the validity of the School's dress code in order to rule on the preliminary injunction. As to Harper's equal protection contention, as presented on this appeal it is simply

a restatement of his viewpoint discrimination claim which, for the reasons already provided, we have rejected. Whether or not there may be other aspects to the claim we do not know with certainty at this point in the proceedings; thus we do not review that claim here. Accordingly, neither the due process nor equal protection claim is one we must decide in order to resolve the issue before us, and our resolution of the issue before us does not require us to determine the merits of either claim. Whatever the merits of those claims (and we have no cause here to question the district court's decision as to either), their validity or invalidity is of no consequence here. Finally, the district court's dismissal of Harper's damages claims based on a finding of qualified immunity is not "inextricably intertwined" with the denial of the preliminary injunction motion, *Poulos*, 379 F.3d at 668, as we need not "decide the [qualified immunity] issue in order to review the claims properly raised on interlocutory appeal . . . ." *Batzel*, 333 F.3d at 1023 (quoting *Cunningham v. Gates*, 229 F.3d 1271, 1284 (9th Cir. 2000)).

VI. Conclusion

We hold that the district court did not abuse its discretion in denying the preliminary injunction. Harper failed to demonstrate that he will likely prevail on the merits of his free speech, free exercise of religion, or establishment of religion claims. In fact, such future success on Harper's part is highly unlikely, given the

legal principles discussed in this opinion. The Free Speech Clause permits public schools to restrict student speech that intrudes upon the rights of other students. Injurious speech that may be so limited is not immune from regulation simply because it reflects the speaker's religious views. Accordingly, we affirm the district court's denial of Harper's motion for a preliminary injunction.

AFFIRMED; REMANDED for further proceedings consistent with this opinion.

Exhibit A

COUNSEL

Robert H. Tyler, Kevin Theriot; Alliance Defense Fund, Murrieta, California, for the plaintiff-appellant.

Daniel Shinoff, Jack M. Sleeth, Jr., Paul V. Carelli, IV; Stutz, Artiano, Shinoff & Holtz, APC, San Diego, California, for the defendants-appellees.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TYLER CHASE HARPER, a minor, by and through his parents Ron and Cheryl Harper; RON HARPER; CHERYL HARPER; KESLIE K. HARPERE, a minor, by and through his parents Ron and Cheryl Harper,

Plaintiffs-Appellants,

v.

POWAY UNIFIED SCHOOL DISTRICT; JEFF MANGUM; LINDA VANDERVEEN; PENNY RANFTYLE; STEVE MCMILLAN; ANDY PATAPOW, All Individually and in their official capacity as Members of the Board of the Poway Unified School District; DONALD A. PHILLIPS, Individually, and in his official capacity as Superintendent of the Poway Unified School District; SCOTT FISHER, Individually and in his official capacity as Principal of Poway High School; LYNELL ANTRIM, Individually and in her official capacity as Assistant Principal of Poway High School; ED GILES, Individually and in his official capacity as Vice Principal of Poway High School; DAVID LEMASTER, Individually and in his official capacity as Teacher of Poway High School; DOES 1 THROUGH 20, INCLUSIVE,

Defendants-Appellees.

No. 04-57037

D.C. No. CV-04-01103-JAH Southern District of California, San Diego

ORDER

Filed July 31, 2006

Before: Stephen Reinhardt, Alex Kozinski, and Sidney R. Thomas, Circuit Judges.

Order;
Concurrence by Judge Reinhardt;
Concurrence by Judge Gould;
Dissent by Judge O'Scannlain

ORDER

A judge requested a vote on whether to rehear this matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The request for rehearing en banc is denied.

REINHARDT, Circuit Judge, concurring in the order denying the petition for rehearing en banc:

The dissenters still don't get the message — or *Tinker*! Advising a young high school or grade school student while he is in class that he and other gays and lesbians are shameful, and that God disapproves of him, is not simply "unpleasant and offensive." It strikes at the very core of the young student's dignity and self-worth. Similarly, the example Judge Kozinski offers, a T-shirt bearing the message, "Hitler Had the Right Idea" on one side and "Let's Finish the Job!" on the other, serves to intimidate and injure young Jewish students in the same way, as would T-shirts worn by groups of white students bearing the message "Hide Your Sisters — The Blacks Are Coming." Under the dissent's view, large numbers of majority students could wear such shirts to class on a daily

basis, at least until the time minority members chose to fight back physically and disrupt the school's normal educational process. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969).

Perhaps some of us are unaware of, or have forgotten, what it is like to be young, belong to a small minority group, and be subjected to verbal assaults and opprobrium while trying to get an education in a public school, or perhaps some are simply insensitive to the injury that public scorn and ridicule can cause young minority students. Or maybe some simply find it difficult to comprehend the extent of the injury attacks such as Harper's cause gay students. Whatever the reason for the dissenters' blindness, it is surely not beyond the authority of local school boards to attempt to protect young minority students against verbal persecution, and the exercise of that authority by school boards is surely consistent with *Tinker*'s protection of the right of individual students "to be secure and to be let alone." *Tinker*, 393 U.S. at 508.

GOULD, Circuit Judge, concurring in the order denying the petition for rehearing en banc:

Hate speech, whether in the form of a burning cross, or in the form of a call for genocide, or in the form of a tee shirt misusing biblical text to hold gay students to scorn, need not under Supreme Court decisions be given the full protection of the First Amendment in the context of the school environment, where administrators have a duty to protect students from physical or psychological harms.

O'SCANNLAIN, Circuit Judge, with whom KLEINFELD, TALLMAN, BYBEE, and BEA, Circuit Judges, join, dissenting from denial of rehearing en banc:

Judge Kozinski's powerful dissent explains why the court errs in permitting school administrators to engage in viewpoint discrimination on the basis of a student's newly promulgated right to be free from certain offensive speech. I write only to emphasize why it was a mistake to fail to rehear this case en banc.

I

The Supreme Court has clearly stated that

> [i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969). Tyler Harper wore a T-shirt to his high school with the words "Be Ashamed, Our School Embraced What God Has Condemned" on the front and "Homosexuality Is Shameful 'Romans 1:27' " on the back. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006). Harper's shirt was undoubtedly unpleasant and offensive to some students, but *Tinker* does not permit school administrators to ban speech on the basis of "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509.

Nevertheless, the panel majority stretches mightily to characterize Harper's message as a psychological attack that might "cause young people to question their self-worth and their rightful place in society." *Harper*, 445 F.3d at 1178.

According to the panel majority, a student's "right to be let alone" now includes a right to be free from "verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation." *Id.* But if displaying a distasteful opinion on a T-shirt qualifies as a psychological or verbal assault, school administrators have virtually unfettered discretion to ban any student speech they deem offensive or intolerant.

In my view, this unprecedented—and unsupportable—expansion of the right to be let alone as including a right not to be offended has no basis in *Tinker* or its progeny, and we neglect our duty by failing to reexamine the majority's decision.

II

In reality, the panel majority's decision amounts to approval of blatant viewpoint discrimination. Harper wore his T-shirt after students involved in the Gay-Straight Alliance organized a "Day of Silence" in support of those of a different sexual orientation. School administrators permitted the "Day of Silence" but prohibited Harper from offering a different view—a decision now upheld by this court.

Such action is directly contrary to the "prohibition on viewpoint discrimination [that] serves . . . to bar the government from skewing public debate." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 894 (1995). We normally subject this type of viewpoint discrimination "to the most exacting First Amendment scrutiny," *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001), because it "suggests an attempt to give one side of a debatable public question an advantage in expressing its views," *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). The panel majority failed to do so in this case.

Instead, under the panel majority's decision, school administrators are now free to give one side of debatable public

questions a free pass while muzzling voices raised in opposition. A respected First Amendment scholar notes that the panel majority's decision constitutes

> a dangerous retreat from our tradition that the First Amendment is viewpoint-neutral. It's an opening to a First Amendment limited by rights to be free from offensive viewpoints. It's a tool for suppression of one side of public debates (about same-sex marriage, about Islam, quite likely about illegal immigration, and more) while the other side remains constitutionally protected and even encouraged by the government.

Eugene Volokh, *Sorry, Your Viewpoint Is Excluded from First Amendment Protection*, April 20, 2006, http://volokh.com/posts/1145577196.shtml. No Supreme Court decision empowers our public schools to engage in such censorship nor has gone so far in favoring one viewpoint over another.

III

I regret that we have failed to avail ourselves of the opportunity to reconsider a decision that departs so sharply from long-accepted First Amendment principles. I therefore respectfully dissent from our order denying rehearing en banc.

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